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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

**MICHIGAN CITIZENS FOR AN
INDEPENDENT PRESS, et al.,**
Petitioners,

v.

**RICHARD THORNBURGH,
UNITED STATES ATTORNEY GENERAL, et al.,**
Respondents.

**APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**BEFORE THE
ATTORNEY GENERAL OF THE UNITED STATES**

In the Matter of:

Application by Detroit Free Press)	Docket No.
Incorporated, and The Detroit News,)	44-03-24-8
Inc., for Approval of a Joint)	
Newspaper Operating Arrangement)	[December
Pursuant to the Newspaper)	29, 1987]
Preservation Act, 15 U.S.C.)	
§ § 1801, <i>et seq.</i>)	
)	

RECOMMENDED DECISION

By Morton Needelman, Administrative Law Judge

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I

STATEMENT OF THE PROCEEDINGS

On May 9, 1986, the *Detroit Free Press* ("Free Press"), which is published by Detroit Free Press, Incorporated, a wholly owned subsidiary of Knight-Ridder, Inc., and *The Detroit News* ("News"), which is published by The Detroit News, Inc., a wholly-owned subsidiary of Gannett Co., Inc., filed an application for approval of a joint operating arrangement ("JOA"). The proposed JOA would effectively merge the commercial (i.e., non-reportorial and non-editorial) aspects of the only metropolitan daily newspapers serving Detroit, Michigan, and thus end the protracted and bitterly contested Detroit newspaper war.

The application and data supporting the JOA were filed pursuant to the Newspaper Preservation Act ("NPA") which grants a limited antitrust exemption for a JOA receiving the prior written consent of the Attorney General. To qualify for approval, it must be demonstrated to the satisfaction of the Attorney General that one of the parties to the proposed JOA is a "failing newspaper", defined as "a newspaper publication which, regardless of ownership or affiliation, is in probable danger of financial failure." In addition, the Attorney General must determine that approval "would effectuate the policy and purpose" of NPA which is to maintain "a newspaper press editorially and reportorially independent and competitive in all parts of the United States."

In order to determine whether the Free Press meets the crucial "failing newspaper" standard of NPA, and thus is entitled to enter into the proposed agreement with the News, on February 25, 1987, the Attorney General ordered that an Administrative Law Judge conduct a hearing in accordance with the Department of Justice's NPA Regulations, 28 C.F.R. §

48.10. This order, which came after a period of public comment on the proposed JOA and recommendations of the Acting Assistant Attorney General for the Antitrust Division, directed that a record be developed in the following seven areas bearing on the "failing newspaper" question:

1. The relevance in the Detroit newspaper market of economies of scale, and the extent to which the two newspapers' unit costs differ.
2. The possibility of geographic, demographic or other segmentation of the Detroit newspaper market, and its implications for the viability of two competing newspapers.
3. The reliability, as an indicator of the viability of competing newspapers in Detroit, of the recent financial performance of the *Detroit Free Press* and *The Detroit News*, in light of the economic recession and the possibility that one or both of the newspapers may have been seeking market dominance rather than near-term profitability.
4. The financial history of the *Detroit Free Press* as a separate economic unit, considering specifically capital structure, taxes and management fees.
5. The cause of *The Detroit News*' losses in 1986 after a profitable 1985.
6. The proper characterization of expenses incurred by the *Detroit Free Press* in its effort to achieve market dominance, specifically whether any of those expenditures are properly regarded as capital investments, and the proper amortization period of the *Detroit Free Press*' investment in its Riverfront plant.
7. The *Detroit Free Press*' prospects for long-term profitability in the Detroit newspaper market in light

of (a) favorable advertiser, demographic and subscriber trends, (b) the possibility of significant cost savings, and (c) the possibility of a price increase.

Following designation by the Attorney General of the major Detroit area newspaper unions and the Honorable Coleman A. Young, Mayor of Detroit, as Intervenors with party status, a prehearing conference was held in Detroit on April 9, 1987. At that time and subsequently through the use of telephonic prehearing conferences, a schedule was set, discovery problems were resolved,¹ and two basic ground rules for the formal hearings were established: intervenor representation was to be coordinated; and all parties — Applicants, Antitrust Division, and Intervenors — were required to present the direct testimony of their witnesses in writing in advance of the formal hearings, the hearings being reserved essentially for cross-examination and a hybrid form of redirect that allowed for the introduction of evidence rebutting the previously filed written direct testimony of opposition witnesses.

On July 17, 1987, objections to proposed exhibits (including written direct testimony) were heard. The witnesses were then presented for cross-examination and rebuttal in Detroit between August 3 and August 24 when the record was closed for the receipt of evidence. During these hearings counsel for all parties were given full opportunity to be heard and to

¹In addition to the use of telephonic prehearing conferences, the discovery stage (document production, written interrogatories, witness interviews and depositions) was somewhat shortened by moving the massive pre-hearing public record (including virtually all documents filed by the newspapers with the Attorney General in support of the application) to Detroit for easier intervenor access. The entry of a strict protective order was designed to discourage time-consuming confidentiality arguments and appeals to the Assistant Attorney General, who had been designated as the reviewing authority for all procedural matters.

examine the witnesses. The parties filed their proposed findings and main briefs on September 23, 1987. Replies were filed on October 14, 1987.

After reviewing all the evidence as well as the proposed findings, conclusions, and briefs submitted by the parties, and based on the entire hearing record including a determination of the credibility of witnesses (which took into account demeanor and the consistency between prepared for litigation testimony, expert or otherwise, and the plain meaning of everyday business records written before the JOA application was filed) I make the following findings of fact:²

²Proposed findings not adopted in the form or substance proposed are rejected as either not supported by the entire record or as involving immaterial or irrelevant matters.

The following abbreviations are used throughout in citing to the record:

NX (Applicant newspapers' exhibits)
AX (Antitrust Division's exhibits)
IX (Intervenors' exhibits)

At the ALJ's direction the parties prepared Joint Exhibits (JX1-JX27) outlining the basic business and financial facts respecting the two newspapers. These JX's are the sources for the tables appearing in the Findings of Fact. Indices to the parties' exhibits were marked as Administrative Law Judge Exhibits (ALJ Exhibits 1-3) and appear as the first exhibit in Volume I of each party's bound volumes of exhibits.

The direct testimony, which was submitted in written form prior to the start of the formal hearings in Detroit, is cited by the exhibit number followed by a paragraph (§) reference and witness's name as in NX 800Z-30 § 96 (Rosse). Testimony on cross-examination or in rebuttal is cited by the witness's name followed by the transcript page as in Rosse 2452. Bound, bulky, and paginated exhibits were marked with letters as physical exhibits followed either by a page reference as in AX A p. K001791 or by reference to some document included within the physical exhibit as in NX C-2 Ex. 1 § 4.2.

Applicants requested in camera treatment for a limited number of exhibits and after an adequate justification was made pursuant to the Federal Rules of Civil Procedure, it was ordered that these exhibits were to be segregated and placed in an in camera file. The Omnibus In Camera Order

(²footnote continued from previous page)
issued on July 21, 1987, which governs all in camera exhibits, provides in part as follows:

It should be clearly understood that nothing contained in this Order in any way limits the public use of this material in decisions written by the Administrative Law Judge, the Attorney General, or reviewing courts. While I have no intention of making unnecessary disclosures, whether or not to publish in my Recommended Decision all or part of the material contained in in camera exhibits must be left solely to the discretion of the Administrative Law Judge, and I must reserve the right to exercise this discretion without consulting any party.

The appearances of the witnesses were as follows:

Name	Called By	Exhibit No. For Direct Testimony	Transcript for Cross, Redirect, and Rebuttal Testimony
Robert H. Thibault Partner, accounting firm of Ernst & Whinney	Applicants	NX 500	257-555
Stewart J. Hahn, Partner, accounting firm of Arthur Andersen & Co.	Applicants	NX 600	637-902
Robert J. Hall, Ex. V.P. and General Manager, Free Press	Applicants	NX 200	920-1344
Peter B. Clark, Formerly, Chairman, Evening News Association, now, a board member of Gannett	Applicants	NX 400	1352-1519
Allen H. Neuharth, CEO and Chairman, Gannett	Applicants	NX 300	1519-1761
Alvah H. Chapman, CEO and Chairman, Knight-Ridder	Applicants	NX 100	1762-2154
John E. Morton, Retained expert	Applicants	NX 700	2156-2372

II. FINDINGS OF FACT

A. The Great Detroit Newspaper War

1. The Rivals

1. This JOA application represents the largest proposed consolidation considered to date under the Newspaper Preser-

(²footnote continued from previous page)

James N. Rosse, Retained expert	Applicants	NX 800	2379-2819
David N. Lawrence, Jr., Publisher, Free Press	Antitrust Division	Mr. Lawrence, an adverse witness, did not file written direct.	2820-3049
John E. Kwoka, Jr., Retained expert	Antitrust Division	AX 200	3050-3140
Kenneth C. Baseman, Retained expert	Antitrust Division	AX 300	3141-3207
Marilyn J. Simon, Expert on the staff Divi- sion of Antitrust Division	Antitrust	AX 100	3210-3254
Dorn K. Dean, Retained expert	Intervenors	IX 450	3269-3321
Robert C. Nelson, Formerly, Publisher of the News, now, Special Assistant to the Chairman, Gannett	Intervenors	Mr. Nelson, an adverse witness, did not file written direct.	3339-3451
J. Chester Johnson, Retained expert	Intervenors	IX 405	3453-3524
Coleman A. Young, Mayor of Detroit	Intervenors	IX 400	By stipulation part of Mayor Young's pre- hearing deposition, NX 860 was received into evidence in lieu of cross-examination.

vation Act.³ In the News and Free Press it would bring together, respectively, the nation's seventh and eighth largest daily and the seventh and ninth largest Sunday newspapers. The corporate parents of the papers are the two largest news organizations in the United States.⁴

2. The alleged "failing newspaper," the Free Press, is a morning metropolitan daily of general interest serving the Detroit, Michigan area. It began publishing once a week in 1831 under the banner of the *Democratic Free Press and Michigan Intelligencer*. By 1835, the paper was being published six days a week and a Sunday edition was added in 1853. In 1940, John S. Knight purchased the Free Press for \$3.2 million, and it became part of the newspaper group owned by Knight Newspapers. When Knight Newspapers merged with Ridder Publication in 1974, Detroit Free Press, Incorporated, became a wholly-owned subsidiary of Knight-Ridder, Inc.⁵

3. Knight-Ridder, Inc. ("Knight-Ridder"), which has its corporate headquarters in Miami, Florida, is the nation's second largest newspaper group with company-wide total daily paid circulation exceeding 3.7 million. It reported operating revenues of over \$1.9 billion in 1986 and net income of over \$140 million. About 90% of Knight-Ridder's revenues are derived from its 31 daily newspapers which include *The Miami Herald*, *Detroit Free Press*, and Philadelphia's only metropolitan papers, *The Philadelphia Inquirer* and *Philadelphia Daily News*. In ad-

³ The circulation of the Free Press and News exceeds the combined circulation of all other papers which have previously applied for advance JOA approval. IX 450F ¶ 18 (Dean), IX 452. By the same token, the losses of the Free Press and News far exceed the combined losses of all prior JOA applicants. NX C-1, p. 12, Appendix I, pp. 43-44.

⁴ NX A, pp. 4-5, 62, NX 300C ¶ 10 (Neuharth); AX 2A-E.

⁵ NX A, pp. 2, 62, NX C-1, Appendix I, p. 2, NX 100A-B ¶¶ 2, 5 (Chapman); IX 225E.

dition to newspapers, Knight-Ridder has magazine and broadcasting interests.⁶

4. Joining with the Free Press in the JOA application is the News, the only other metropolitan daily of general interest serving Detroit. The News was first published as *The Evening News* in 1873 by James E. Scripps who created the Evening News Association ("ENA") as the privately-held corporate parent for the News and other media properties. In 1960, ENA purchased from the Hearst chain the assets of the *Detroit Times*, at that time Detroit's third general interest daily newspaper. In addition to the News, ENA owned newspapers in New Jersey and California, a radio station in Detroit, and five television stations including the CBS affiliate (Channel 9) in Washington, D.C. In August 1985, Gannett co., Inc. contracted to buy ENA for \$717 million. The sale was consummated on February 18, 1986.⁷

5. Gannett Co., Inc. ("Gannett"), which has its corporate headquarters in Arlington, Virginia, reported operating revenues exceeding \$2.8 billion in 1986 and net income of over \$276 million. It publishes 93 daily newspapers including the domestic and international editions of *USA Today* as well as 39 nondailies. In all, its newspapers have a total paid circulation of more than 6.1 million, making Gannett the largest newspaper group in the United States. In addition to newspapers, Gannett owns eight television stations (including Channel 9, Washington, D.C., renamed "WUSA-TV" after the acquisition of ENA), 18 radio stations, and the nation's largest outdoor advertising company. Among its larger daily

⁶Chapman 1985; NX A, pp. 2, 4-5, 44 NX C-1, Appendix I, pp. 1-2, NX 100B-C ¶ 7 (Chapman).

⁷NX C-1, Appendix I, p. 3 NX 400A-B, D, E, S ¶¶ 1-2, 4, 9, 42 (Clark); IX 255 F. Of the \$717 million paid for ENA, Gannett has attributed \$150 million to the value of the News. Neuharth 162728.

newspapers are *The Detroit News*, *The Des Moines Register*, *The Louisville CourierJournal*, *The Cincinnati Enquirer*, *Honolulu Star-Bulletin*, *The Nashville Tennessean*, and *Arkansas Gazette*. Gannett also publishes *USA Weekend*, a weekend supplement carried in approximately 280 newspapers with a combined circulation of over 13.7 million. Gannett owns Louis Harris & Associates, an international research company, and it operates a television programming production company called GTG Entertainment.⁸

2. The Setting

6. Detroit, a great metropolitan center and the sixth largest city in the United States,⁹ has seen better days as shown in Table 1, the demographics for Wayne, Detroit's home county.

7. The decline in Detroit's population since 1960 traces to several economic and social forces, but there is no dispute that the race-related riots which erupted in 1967 were a significant cause of an exodus from the city's center.¹⁰ Also, as indicated in Finding 11, Detroit lost ground (and population) in the severe 1979-1984 depression that hit the automobile industry.

8. The most recent census figures for the period ending June 1987 suggest, however, that Detroit's six-year population decline may have been arrested.¹¹

⁸NX A, p. 4, NX B, p. 37, NX 300C-D ¶ 10 (Neuharth).

⁹Detroit is by far the largest market in which advance approval for a JOA has been sought under NPA. Detroit is about three times larger than Seattle or Cincinnati, 10 times larger than Chattanooga, and 25 times larger than Anchorage. IX 450F ¶ 19 (Dean), IX 453.

¹⁰Nelson 3420-21; NX 400E ¶ 13 (Clark).

¹¹IX 391.

**Table 1: Wayne County Demographics
(1960-1985)**

	Population (1000's)	Households (1000's)	Retail Sales (000's of \$)	Retail Sales (000's of \$67)	CPI
1960	2,678.9	774.9	3,572,560	4,027,689	88.7
1961	2,703.7	792.4	3,412,582	3,808,685	89.6
1962	2,716.1	794.8	3,669,231	4,049,924	90.6
1963	2,717.1	794.3	3,869,679	4,219,933	91.7
1964	2,708.5	791.8	4,005,547	4,311,676	92.9
1965	2,710.0	794.7	4,603,010	4,870,910	94.5
1966	2,705.6	794.2	4,759,520	4,896,626	97.2
1967	2,713.8	799.5	4,667,484	4,667,484	100.0
1968	2,727.3	812.8	5,005,881	4,804,108	104.2
1969	2,723.3	821.0	4,878,195	4,442,801	109.8
1970	2,701.7	844.3	4,812,867	4,138,321	116.3
1971	2,708.8	848.8	5,178,730	4,269,357	121.3
1972	2,716.9	882.0	5,437,567	4,339,638	125.3
1973	2,637.5	870.5	5,891,881	4,426,657	133.1
1974	2,567.7	858.8	6,529,683	4,420,909	147.7
1975	2,526.0	850.8	6,843,574	4,245,393	161.2
1976	2,490.8	857.8	7,775,192	4,560,230	170.5
1977	2,445.8	851.6	7,776,341	4,284,485	181.5
1978	2,405.0	842.1	9,578,507	4,901,999	195.4
1979	2,359.1	833.0	10,009,791	4,604,320	217.4
1980	2,310.4	822.2	10,009,293	4,055,629	246.8
1981	2,272.7	816.1	10,764,482	3,951,719	272.4
1982	2,231.5	803.5	10,331,026	3,573,513	289.1
1983	2,177.6	793.8	10,272,548	3,442,543	298.4
1984	2,178.4	804.6	10,072,940	3,237,846	311.1
1985	2,171.4	804.1	11,250,997	3,491,930	322.2

Source: JX 10.

9. In the larger battlefield of the Detroit newspaper war, the so-called "PMA" (the papers' "Primary Marketing Area"), Wayne's neighboring counties of Macomb and Oakland are growing.¹² But notwithstanding this growth, the overall PMA population reached its peak in 1972, and has declined slightly since then as seen in Tables 2-4.

¹²IX 277B.**Table 2: Oakland County Demographics
(1960-1985)**

	Population (1000's)	Households (1000's)	Retail Sales (000's of \$)	Retail Sales (000's of \$67)	CPI
1960	733.8	210.2	988,927	1,114,912	88.7
1961	746.5	204.2	962,709	1,074,452	89.6
1962	757.9	207.4	1,068,832	1,179,726	90.6
1963	750.0	205.2	1,179,309	1,286,051	91.7
1964	758.7	207.7	1,224,822	1,318,431	92.9
1965	765.0	210.2	1,402,782	1,484,425	94.5
1966	780.8	215.9	1,528,795	1,572,834	97.2
1967	821.6	228.0	1,623,791	1,623,791	100.0
1968	851.2	239.3	1,830,167	1,756,398	104.2
1969	863.1	245.7	1,822,215	1,659,577	109.8
1970	912.8	267.5	1,858,212	1,597,775	116.3
1971	916.1	269.2	2,199,490	1,813,265	121.3
1972	923.9	281.3	2,455,975	1,960,076	125.3
1973	933.5	289.0	2,903,357	2,181,335	133.1
1974	952.3	298.5	3,190,423	2,160,070	147.7
1975	965.4	304.8	3,341,897	2,073,137	161.2
1976	970.7	313.4	3,719,645	2,181,610	170.5
1977	973.6	317.8	3,869,164	2,131,771	181.5
1978	992.8	324.1	4,798,909	2,455,941	195.4
1979	1,010.5	331.0	5,894,176	2,711,213	217.4
1980	1,019.5	363.2	5,976,644	2,421,655	246.8
1981	1,026.4	371.1	6,445,016	2,366,012	272.4
1982	1,023.1	372.7	6,588,580	2,278,997	289.1
1983	1,014.0	368.6	6,647,396	2,227,680	298.4
1984	1,021.7	376.3	7,535,089	2,422,079	311.1
1985	1,029.1	380.2	8,481,600	2,632,402	322.2

Source: JX 9.

**Table 3: Macomb County Demographics
(1960-1985)**

	Population (1000's)	Households (1000's)	Retail Sales (000's of \$)	Retail Sales (000's of \$67)	CPI
1960	437.7	120.9	418,149	471,419	88.7
1961	436.6	114.6	403,697	450,555	89.6
1962	452.7	119.0	484,353	534,606	90.6
1963	476.9	125.3	554,397	604,577	91.7
1964	502.7	132.2	610,498	657,156	92.9
1965	521.9	137.8	716,122	757,801	94.5
1966	554.1	147.6	785,512	808,140	97.2
1967	578.4	154.8	816,001	816,001	100.0
1968	596.3	161.6	915,341	878,446	104.2
1969	629.9	172.9	1,059,470	964,909	109.8
1970	627.0	172.7	1,032,524	887,811	116.3
1971	631.3	174.4	1,196,293	986,227	121.3
1972	637.9	182.6	1,354,939	1,081,356	125.3
1973	647.8	188.9	1,601,085	1,202,919	133.1
1974	651.9	192.3	1,729,688	1,171,082	147.7
1975	669.3	198.8	1,799,830	1,116,520	161.2
1976	672.2	204.2	2,018,650	1,183,959	170.5
1977	676.7	207.8	2,045,319	1,126,898	181.5
1978	695.4	216.8	2,429,736	1,243,468	195.4
1979	702.4	222.8	3,664,670	1,685,681	217.4
1980	699.1	235.0	3,685,942	1,493,494	246.8
1981	705.0	240.7	4,001,227	1,468,879	272.4
1982	701.7	241.8	4,090,604	1,414,944	289.1
1983	697.7	239.9	4,122,409	1,381,504	298.4
1984	699.2	243.7	4,302,197	1,382,898	311.1
1985	699.6	244.5	4,829,219	1,498,827	322.2

Source: JX 8.

**Table 4: Total of Wayne, Oakland
and Macomb Demographics (1960-1985)**

	Population (1000's)	Households (1000's)	Retail Sales (000's of \$)	Retail Sales (000's of \$67)	CPI
1960	3,850.4	1,106.0	4,979,636	5,614,020	88.7
1961	3,886.8	1,111.2	4,778,988	5,333,692	89.6
1962	3,926.7	1,121.2	5,222,416	5,764,256	90.6
1963	3,944.0	1,124.8	5,603,385	6,110,562	91.7
1964	3,969.9	1,131.7	5,840,867	6,287,263	92.9
1965	3,996.9	1,142.7	6,721,914	7,113,137	94.5
1966	4,040.5	1,157.7	7,073,827	7,277,600	97.2
1967	4,113.8	1,182.3	7,107,276	7,107,276	100.0
1968	4,174.8	1,213.7	7,751,389	7,438,953	104.2
1969	4,216.3	1,239.6	7,759,880	7,067,286	109.8
1970	4,241.5	1,284.5	7,703,603	6,623,906	116.3
1971	4,256.2	1,292.4	8,574,513	7,068,848	121.3
1972	4,278.7	1,345.9	9,248,481	7,381,070	125.3
1973	4,218.8	1,348.4	10,396,323	7,810,911	133.1
1974	4,171.9	1,349.6	11,449,794	7,752,061	147.7
1975	4,160.7	1,354.4	11,985,301	7,435,050	161.2
1976	4,133.7	1,375.4	13,513,487	7,925,799	170.5
1977	4,096.1	1,377.2	13,690,824	7,543,154	181.5
1978	4,093.2	1,383.0	16,807,152	8,601,408	195.4
1979	4,072.0	1,386.8	19,568,637	9,001,213	217.4
1980	4,029.0	1,420.4	19,671,879	7,970,778	246.8
1981	4,004.1	1,427.9	21,210,725	7,786,610	272.4
1982	3,956.3	1,418.0	21,010,210	7,267,454	289.1
1983	3,889.3	1,402.3	21,042,353	7,051,727	298.4
1984	3,899.3	1,424.6	21,910,226	7,042,824	311.1
1985	3,900.1	1,428.8	24,561,816	7,623,158	322.2

Source: JX 11.

10. If the newspaper's PMA is expanded by adding nearby (and relatively small) Lapeer, Livingston, Monroe, and St. Clair counties in order to conform to the more widely-used non-newspaper measure, Primarily Metropolitan Statistical Area or "PMSA",¹³ the importance of the Detroit market becomes

¹³NX C-1, Appendix I, p. 22. "PMSA" has apparently replaced SMSA (Standard Metropolitan Statistical Area) which in the Detroit area consists of Lapeer, Livingston, Macomb, Oakland, St. Clair, and Wayne counties. NX C-5 ¶ 1B.

readily apparent. In 1986, the Detroit PMSA ranked fifth in the nation in both population (4,361,000) and number of households (1,576,700). The Detroit PMSA also ranked second nationally in suburban population (those persons living outside the limits of the city center), trailing only the Los Angeles-Long Beach metropolitan area. Detroit ranks sixth in buying income, eighth in households with income over \$50,000, and sixth in total retail sales.¹⁴

11. Historically, the economy of the densely-populated Detroit metropolitan area has been subject to the vagaries of the highly cyclical automobile industry, which suffered a severe depression in 1979. The depression (brought on by a combination of high interest rates, real decline in purchasing power, and foreign competition) was both deeper and longer than the recession that hit most other areas of the country. The number of employees in the Detroit area declined as automobile workers pulled up stakes and looked elsewhere for work. Personal income and retail sales also declined and business failure increased.¹⁵

12. The effects of the 1979-1984 depression on both the Free Press and News were severe since a newspaper's circulation and advertising revenue tend to reflect the size of the underlying market and the level of its economic activity.¹⁶ Local businesses cut back on advertising lineage to the point that multiple listings were discontinued, and even in the one chosen paper, a smaller amount was spent on advertising.¹⁷

¹⁴NX 203H; AX 1A-1''0'', AX 504C.

¹⁵Clark 1487-90, Rosse 2687, 2709, Dean 3312; NX C-1, p. 11, Appendix I, pp. 23-25, NX D, p. F75275, NX 400H-''I'' ¶¶ 18, 19 (Clark), NX 800 Z-23 to Z-24 ¶ 82 (Rosse), NX 852B.

¹⁶Clark 1487-90, Rosse 2674-75, 2704, Nelson 3374-75; IX 4E.

¹⁷NX D, pp. F75266-73, NX 848C.

13. Despite urban riots, stagnant population growth, and uncertainty about the automotive industry, the Detroit newspaper market has always been regarded by the Free Press and News as a choice prize.¹⁸ Detroit is the nation's fourth largest market in terms of overall newspaper circulation, exceeded only by New York, Chicago, and Los Angeles. In addition, Detroit has the highest per capita newspaper readership in the United States, and it is first among the top ten markets in newspaper penetration of households.¹⁹

3. The History

14. The rivalry between the Free Press and the News over this huge Detroit newspaper market traces back into dim history.²⁰ The modern phase of the "Great Detroit Newspaper War"²¹ began in 1960 when the News bought the assets of the *Detroit Times* (principally its circulation lists) from Hearst. As a result of the acquisition, the News gained a substantial circulation lead over the Free Press.²²

15. The News's lead, however, was vulnerable to the Free Press's strategic positioning as the morning paper. Not only did the Free Press have a distributional edge (it is much easier to deliver a paper before the morning rush hour in contrast to the congestion problems faced by the afternoon paper) but the morning paper is also favored by white collar workers who have time to read before going off to work, and unlike the after-

¹⁸See Finding 98.

¹⁹AX 570Z-3; IX 22E, IX 373A, IX 462.

²⁰See IX 255E-U.

²¹IX 99C.

²²Clark 1446, 1499, Nelson 3340-41; NX 400E ¶ 12 (Clark), NX 702G, NX 852F; IX 26Z-76, IX 27A, IX 96A, IX 266C.

noon paper it does not face the stiff competition of television evening news programs.²³

16. External events also seemed to favor the Free Press. To illustrate, the 1967 riots had a greater impact on the News than the Free Press because the News's basic strength has always been in the city center itself.²⁴ Moreover, the 1968 strike against the two papers hurt the News more than the Free Press because the News was targeted by the unions as the main objective of the work stoppage. Most significantly, the early and mid-1970's brought life style and economic changes — inner city decay and flight to the suburbs, more women entering the job market, and the proliferation of white-collar service industry jobs — which favored the morning paper over its afternoon rival.²⁵

17. The News did not cravenly accept these reversals. In 1973, in what may have been the opening salvo of the latest and most bitter phase of the great Detroit newspaper war, the News built a plant in Sterling Heights, Michigan, which was specifically designed not only to facilitate delivery to its core readership in the central city, but also to challenge the Free Press's strength in servicing suburban and out-state readers removed from the central city area.²⁶

²³Morton 2191-92, 2274, Clark 1486-87; NX 400E ¶ 13 (Clark); IX 131E, IX 255K. The power of the morning franchise is such that under the proposed JOA, which requires the News to relinquish its minority share of the morning market (see Finding 137), the Free Press will become dominant in circulation. Clark 1477, Morton 2312-14; IX 251A-B, IX 265U.

²⁴Nelson 3417-18, 3420-22; IX 10C.

²⁵Clark 1485-86, 1514-15, Chapman 2086-87, Rosse 2505-06, 25992600; NX 400E ¶ 13 (Clark); IX 131E, IX 255L. Because of this trend, most of the major papers which have closed in the past 10 years have been afternoon papers. Chapman 1983-84.

²⁶Nelson 3355-58; NX 400F ¶ 14 (Clark); IX 255M.

18. The News made an even more direct challenge to the Free Press's main strength (its morning franchise) in 1976 when it began out-state home delivery and street sales of a morning edition.²⁷ At the the same time, the News made plans for the opening in late 1980 of a Lansing, Michigan satellite plant which would further challenge Free Press out-state and morning dominance with morning home delivery of an edition that went to press later than the Free Press's and thus contained more late-breaking news and final sports scores.²⁹

19. The ability of the Free Press to counteract these initiatives by moving aggressively against News strength in nearby circulation zones (the so-called "PMA", "CZ" and "RTZ") was limited by its lack of press capacity for producing post-midnight papers. To meet this need Knight-Ridder management in 1976 approved the construction of a new facility equipped with 36 offset presses. This facility (the Riverfront Plant) was designed to permit the Free Press to produce a larger number of late newspapers as well as providing superior color and graphics. The expenditure for Riverfront — \$47 million — was made for the specific purpose of taking the circulation lead away from the News.²⁹

20. Simultaneously with the opening of the Riverfront Plant in 1979, the Free Press signaled its intention of escalating the intensity of the growing war by adopting some of the tactics used successfully in Philadelphia where Knight-Ridder had scored a triumph (after six years of losses) for its papers (*The Inquirer* and *News*) over the rival *Bulletin*.³⁰ This new level

²⁷Clark 1355-56; NX C-1, Appendix I, p. 3, NX 400F ¶ 14 (Clark), NX 852F; IX 255M.

²⁸Clark 1357; NX C-1, appendix I, p. 3, NX 400F ¶ 14 (Clark), NX 852F; IX 342A-B.

²⁹NX C-1, appendix I, pp. 15-16, 50-51, NX C-3, Ex. 22.

³⁰Nelson 3372-74; AX 507B; IX 367A-B.

of competition first appeared in the form of sharp Free Press discounts in advertising rates,³¹ and the announcement of an aggressive circulation plan aimed at gaining 100,000 readers in five years.³²

21. These competitive moves by both papers came as the auto industry was going deeper into the depression begun in 1979, and the national economy entered a period of both recession and inflation which had a particularly severe impact on the cost of newsprint.³³ Revision of postal rates created still additional problems for the newspaper in the form of heightened direct mail competition.³⁴ In answer to these external pressures and the initiatives of the Free Press, the News put into effect steep circulation price cuts off its already low cover price and advertising discounts of its own in a determined effort to gain clear-cut market domination.³⁵

22. Responding to this challenge, Free Press management determined that it too would aim for domination at any cost by discounting advertising rates still further.³⁶ This strategy, which originated when operating losses were already apparent and Detroit was moving still deeper into an economic depression, represented an explicit rejection by the Free Press of

³¹Nelson 3372.

³²Nelson 3372; NX 852G; IX 35D.

³³Clark 1487-89, Chapman 1972-73, Rosse 2485, Nelson 3374-75; NX C-1, p. 14; IX 211A.

³⁴Rosse 2485-86; NX 700Z-15 ¶ 67 (Morton), NX 800Z-24 to Z-25 ¶ 83 (Rosse).

³⁵Clark 1383, 1394-96, 1436-37, 1467-68, Rosse 2445, Nelson 3368, 3373, 3409-10; NX D, p. 72374, NX 400Z-2 ¶ 60 (Clark), NX 852G; AX 515B; IX 10C, IX 26C, IX 55A, IX 219, IX 255A-B, "O", IX 361.

³⁶Clark 1383, 1394-96, 1436-37, 1467-68, Rosse 2445, Nelson 3368, 3373, 3409-10; NX D, p. 72374, NX 400Z-2 ¶ 60 (Clark), NX 852G; AX 515B; IX 10C, IX 26C, IX 55A, IX 219, IX 255A-B, "O", IX 361.

³⁷Lawrence 2898-99; NX 852B.

any thought of signaling the News "to cool it somewhat" until the "economy turns up."³⁷

23. Free Press and Knight-Ridder as well as News and ENA management believed that the goals of dominance and future profitability at the cost of near-term earnings were rational policies given the past history of many union papers which had not been able to survive as the second paper in metropolitan area competition.³⁸

24. As the moves and countermoves described in Findings 20 to 22 were being made, the Free Press and Knight-Ridder also began to calculate the profits to be realized by a JOA as an alternative to the bitter fight for dominance which had developed.³⁹ To that end, peace initiatives in the form of feelers about the possibilities of a JOA were sent out by both Alvah Chapman, Knight-Ridder's CEO, and Peter Clark, ENA's CEO. These initiatives came at a time when the Free Press was completing its second year of operating losses and the News had just experienced its first.⁴⁰ At an early meeting between the two adversaries, it was emphasized that one or both newspapers needed to continue to show losses in order to qualify for a JOA, and that with a few more years of such losses the prospects for a JOA would be "ironclad".⁴¹

³⁷AX 507D; IX 20D. Once the struggle intensified, the Free Press seemed to be impervious to any attempts by the News either "to coach" it into returning to card rates by intermittent lulls in the severity of the discounts (Clark 1372-73; AX 546B) or to change its "style of competition" by a demonstration of the high cost of continued discounting. Clark 1398.

³⁸Clark 1399, 1502-03, Chapman 1854-55, 2141-42, Lawrence 2899-2900; NX 200M-N ¶ 30 (Hall).

³⁹Chapman 1854-59, 1862; NX 852J; AX 507A-C, AX 508A-D; IX 14A-C, IX 16A-C, IX 20A-D, IX 75A-"O".

⁴⁰Findings 83, 92; Clark 1377-82. See also Nelson 3391-93.

⁴¹IX 16B. See also Clark 1379-82, Chapman 2028-30.

25. Negotiations over a JOA continued sporadically during the period January 1981 to January 1984.⁴² Knight-Ridder representatives at first insisted that it must control and operate the JOA as well as receiving a near equal split of the profits.⁴³ ENA was not only unprepared to concede the control point, but it made counter-proposals for various profit splits in its favor.⁴⁴ The issue of how profits were to be split was never the subject of serious negotiation, however, because of the fundamental disagreement over the structure and control of the JOA.⁴⁵ Moreover, the imperfect knowledge each party had of the actual economic performance of the other was still another barrier to the success of these early JOA discussions. Neither Knight-Ridder nor ENA made public disclosure of financial information for its Detroit newspapers on a stand-alone basis. As it happens, during the late 1970's and early 1980's, officials of Knight-Ridder and the Free Press may have seriously overestimated the magnitude of the News's losses, incorrectly assuming them to be on the order of twice those of the Free Press. There is some evidence that this error, combined with the knowledge that Knight-Ridder's financial resources significantly exceeded those of ENA, encouraged the Free Press to spend extravagantly during the mid-1980's in the expectation that the News could ill-afford to meet the financial challenge and would either be driven from the field entirely, or would be forced to accept a JOA structured on

⁴²Clark 1376-82, Chapman 1878, Nelson 3391-3400; AX 7E-G; IX 66B, IX 349G-H.

⁴³AX 507A-D; IX 38B, IX 40A-B, IX 65A-C. See also Chapman 188485.

⁴⁴Clark 1479-81, Nelson 3398; IX 39A-B, IX 59A-B, IX 312B-F, IX 341B.

⁴⁵Clark 1493-94, Chapman 1885-86; NX 400Z-6 to Z-7 ¶ 71 (Clark); AX 515E.

terms favorable to Knight-Ridder.⁴⁶ Progress toward a JOA stalled, however, after Chapman proposed to end uncertainties concerning the actual financial circumstances of the two newspapers by permitting an independent auditor to examine their books. Clark declined the invitation because although he believed the News's financial position to be stronger than the Free Press's, he was unwilling to take the competitive risk of being proven wrong.⁴⁷

26. With the breakdown of the Knight-Ridder—ENA negotiations for a JOA, the Free Press (in concern with KnightRidder corporate executives) began in late 1983 and early 1984 to develop an even more aggressive and comprehensive long-range plan for achieving market domination called "Operation Tiger". The first phase of the plan, "Tiger I", was modeled after the Knight-Ridder "Win Plan" for Philadelphia. The planning for "Tiger I" was completed in May 1984, but the plan itself was not to be fully implemented before 1986.⁴⁸

27. The objectives of Tiger I were two-fold: to achieve profitability through total market dominance (in circulation, advertising, and news and editorial content),⁴⁹ and if that should fail, to force the News to accept a JOA on the free Press's terms.⁵⁰ While Tiger I was essentially a marketing strategy, other in-

⁴⁶See Lawrence 2909-10; AX 504E-F, AX 507A-D, AX 508A-D; IX 61A-B, IX 96A-B, IX 267-I, IX 315A-C, IX 503A-B. The Knight-Ridder strategy was described as "hurt[ing] the News financially [and] putting them in a position where they would have to accept an agency agreement [JOA] on our terms." AX 508A.

⁴⁷AX 515C; IX 70A-B, IX 71, IX 312B.

⁴⁸Chapman 1775-79; AX A, AX 501D, AX 515D; IX 92C-D, IX 96A-H, IX 99A to Z 146, IX 393A-B.

⁴⁹AX A, AX 501D; IX 96A-H, IX 99D, IX 161H, IX 275A.

⁵⁰Chapman 2140; AX 515A-F; IX 96A-H, IX 314A-B, IX 393A-B. Knight-Ridder had pursued similar objectives in Philadelphia with its "Win Plan". IX 364A to Z-41.

initiatives included obtaining the physical capacity for turning out more timely papers, and improving the editorial quality of the paper with an expanded sports coverage, stronger business coverage, new suburban and zoned city sections, and a better Sunday magazine.⁵¹

28. The cost of this overall plan for market domination was estimated at \$26.78 million.⁵² The plan assumed that because of these costs there would be losses in excess of \$27 million for the period 1984 to 1986.⁵³ Tiger I in fact had no specific target date for profitability.⁵⁴ As it happens, it soon became apparent to Free Press management that profitability was out of the question inasmuch as the main battlefield of the Detroit newspaper had become circulation and advertising discounting, which would hardly allow for any daily price increases that might have covered the additional expenses inherent in the Tiger plan itself and thus put the Free Press into the black.⁵⁵

⁵¹IX 99A to Z-146.

⁵²These costs were for improvements in news and editorial (\$7.25 million), promotion (\$4.57 million), production (\$7.59 million), and circulation (\$7.37 million). IX 99L.

⁵³Chapman 1778-79; NX 105; IX 99L. See also IX 394B.

⁵⁴Chapman 1778-89; IX 99G-H.

⁵⁵Clark 1394-95, Chapin 1776-77, 1866, 1951-55, Lawrence 2840, 2879-80, 3025, 3033, NX 400Z-2 ¶ 60 (Clark); AX 503G-"I", AX 514A-B; IX 79A, IX 96D, IX 107, IX 116B. See also Finding 99. The only circulation price increase put into effect during Tiger I was a Sunday increase from 50 cents to 75 cents which was projected to generate \$5.5 million in additional revenue. IX 88D. This increase was originally planned for September 1984 but was delayed until January 1985 because of uncertainty about the response of the News. Chapman 1953, Lawrence 3012-13. Although the News eventually followed the increase in March 1985, the Free Press lost circulation in the interim, and its failure to improve overall Sunday circulation may still be reflective of the 1985 decision. Hall 1262-64, Chapman 1954, 1958-59, 2018-19, Lawrence 2957-58; NX 100Z-46 to Z-45 ¶ 146 (Chapman).

29. Profits were also out of the question for the News since its strategy was to keep the pressure on the Free Press with low circulation and advertising prices that would result in clear dominance or resumption of the JOA negotiations on terms favorable to the News.⁵⁶ This strategy was to be pursued even if it meant that losses were inevitable⁵⁷, and even though News executives believed that the probability of either paper folding was close to zero.⁵⁸

30. Operating losses, which first appeared at the Free Press in 1979 and the News in 1980, grew as the depression deepened and the costs of Tiger I (and the News's own similar initiatives) increased. While some progress was seen at the Free Press in the form of circulation gains⁵⁹, these gains failed to achieve advertising share-of-field improvement in the face of sharp discounting by the News.⁶⁰ The overall goal, however, of dominance was unchanged as revealed in the following Free Press recapitulation:

The original Tiger concept remains solid — that the Free Press would seek to gain supremacy in every single significant category of competition with The Detroit News and to convert that supremacy to domination of the Detroit market.⁶¹

31. With the goals of market dominance or a JOA firmly in mind, Free Press management ordered a reevaluation of the

⁵⁶Clark 1385, 1394-99, 1401-07, 1436-37, Nelson 3369, 3434; NX 400-"O" ¶ 32 (Clark); AX 501H, AX 556; IX 361.

⁵⁷Clark 1397-99, 1436, Nelson 3368.

⁵⁸IX 72A; see also Clark 1392-93, 1437.

⁵⁹IX 111B, IX 118C.

⁶⁰NX 100 Z-22 to Z-23. ¶ 98 (Chapman); IX 111C-D, IX 118D, IX 150D, IX 160B, IX 207A.

⁶¹AX A, p. 1.

Tiger initiative in February 1985.⁶² A reaffirmation of the market dominance strategy led to Tiger II, an expanded and more integrated approach which coincided with the reorganization of the management team of the Free Press. David Lawrence was named publisher, and to run the business end of the paper, Knight-Ridder brought in Robert Hall as General Manager and Jerry Tilis as President, both veterans of the successful Philadelphia campaign by Knight-Ridder's *Inquirer* and *News* to gain dominance over the *Bulletin*.⁶³

32. Tiger II was to be implemented between 1985 and 1987.⁶⁴ The centerpiece of the plan was expansion of the Riverfront Plant. The expansion, like the original construction, was primarily intended to improve the Free Press's ability to deliver post-midnight papers and thus to make inroads into the News's historical lead in the close-in circulation zones.⁶⁵ operating losses, it was hardly perceived as the last gasp of an expiring homunculus. On the contrary, it was undertaken because Free Press and Knight-Ridder executives believed that many aspects of Tiger I had been successful and that the goals of dominance and eventual profitability were within reach. As one senior KnightRidder executive put it, "[Operation Tiger] has been a success" and "the project [proposed press expansion at Riverfront] is crucial to our winning dominance

⁶²IX 161D, H. See also Chapman 1925-26, 2140.

⁶³Hall 921, 1144-45, Chapman 1779-81, Lawrence 2821-22; NX 200A-B ¶ 3 (Hall); IX 133, IX 161D, IX 230A.

⁶⁴AX A. See also IX 342A.

⁶⁵Hall 955-956, 974, 1103, 1250-51, Clark 1442, Chapman 1782-85, 1787-91, 1816, Nelson 3376-77; AX 501A-B, AX 502E, G, AX 515C-D; IX 72Z-15, IX 96C, IX 99F, Z-11 to Z-12, IX 126B, K, N-'O', IX 136B, IX 150E. Knight-Ridder executives believed that the original Riverfront Plant construction had been undertaken with inadequate planning, necessitating the later expansion with its concomitant loss in circulation momentum during the start-up phase of the new press operations. IX 265J-K.

in one of the nation's top half-dozen markets."⁶⁶ This view echoed the sentiments of Free Press management —

If the strategy for making the Detroit Free Press the dominant newspaper in its market were failing, there would be no need to consider additional press capacity for the Free Press. In fact, that strategy—agreed upon by Knight-Ridder and Free Press management in the spring of 1984—is working so well that the Free Press is taxing the capacity of its riverfront plant to sustain post-midnight production.⁶⁷

33. The presentation by Free Press executives to the Knight-Ridder board in justification of the Riverfront Plant expansion included various financial scenarios and projections. These projections did not foresee operating profits until at least 1990 and under some scenarios even later.⁶⁸ Nonetheless, on March 8, 1985, the Knight-Ridder Board approved a capital expenditure of \$22.3 million for the Riverfront Plant expansion and thereby indicated confidence in the predictions of Free Press executives that the investment would eventually bring dominance and a profit to Knight-Ridder shareholders.⁶⁹ According to Chapman —

In late June, we broke ground in Detroit on a \$22 million press expansion project due to be completed in early 1987. This will increase our production capacity by approximately 25 percent — of signifi-

⁶⁶AX 501A; See also Hall 958-59, 970, 990, Chapman 2086, IX 354B, and statement of a Knight-Ridder executive justifying the Riverfront Plant expansion because "we believe confidently that we will become dominant". Morton 2326.

⁶⁷AX 502E. See also IX 136B, IX 270A, IX 371A-F.

⁶⁸Hall 1310-11, Chapman 1829-33, 1840; AX 501Z-2 to Z-4; IX 126Z68 to Z-69.

⁶⁹AX 501A; IX 141A-B, IX 147B-C.

cant importance in the competitive struggle for supremacy in Detroit. Circulation growth of the Detroit Free Press has been encouraging in the past few years, and we expect this trend to continue. This investment reaffirms our confidence in our prospects in the Detroit market and in our newspaper and its management and employees. We believe the return to our shareholders from this investment will be a good one.⁷⁰

Knight-Ridder management gave the following additional justification for the Riverfront Plant expansion:

The Detroit market—the fifth largest in the U.S.—generates approximately \$300 million dollars in total newspaper revenues, which considering the total dollars for which we are competing, we believe that this capital expansion is a wise investment on the part of the KRN shareholders. Not only are we encouraged by the significant growth in circulation but we are heartened by a recent readership study by Scarborough, which shows the Free Press in the important eight-county area gaining more than 11 times as many . . . readers as did The News, and with even larger gains on Sunday. More significantly, the Scarborough study shows Free Press readers have stronger demographic profile than readers of the Detroit News. We are not encouraged by our operating losses. But we are convinced of two things: a \$300 million dollar newspaper market is a prize worth fighting for, and KRN overall will continue to show steady earnings growth while this competitive battle continues.⁷¹

⁷⁰IX 354B.

⁷¹Morton 2324.

34. Because the Riverfront Plant expansion was not completed until December 1986, the added capacity deemed so essential for the confrontation with the News was not even available to the Free Press until six months after the JOA application was filed.⁷²

35. With the completion of the Riverfront Plant expansion, the Free Press's printing facilities are generally regarded as superior to those of the News in terms of reducing waste, ability to expand the number of operating presses, press layout, and the quality of its offset equipment.⁷³

36. In addition to the Riverfront Plant expansion, Tiger II embraced many other specific initiatives including long-term growth in circulation, the selection of target advertising accounts for special sales efforts, the development of specific lineage and share of field goals, reorganization of the newsroom, zoned editions, and major editorial improvements.⁷⁴

37. Tiger II set a financial goal of reducing operating losses by 15% a year but like Tiger I it did not anticipate operating profits while the plan was being implemented. In short, the Free Press and Knight-Ridder recognized that the goals of market dominance or a favorable JOA would involve a long-term effort and that this effort might entail substantial losses over an extended period of time, for not only did the plan embrace the huge expenditures for the Riverfront Plant expansion

⁷²Hall 974-75, Chapman 1845-47, 2086; AX 300C ¶ 5 (Baseman). In the post-JOA period of declining morale and circulation loss, the new presses at Riverfront have only been used to provide fill-in capacity while other presses were out of service for routine maintenance or when there was a sudden surge in demand, as occurred after the August 1987 air disaster at Detroit Metro airport. Hall 1102-1107, Lawrence 3006; AX 8E.

⁷³Clark 1472-75, Neuharth 1550, Nelson 3358-59, 3367; IX 218B, IX 246A-U.

⁷⁴AX A, AX 504A-Y.

sion, but Tiger II's "Program Expense Summary" for 1986-1987 projected that 78 new full-time employees would be needed in order to carry the plan forward. The additional labor and benefit expenses were estimated at \$6.4 million, and the total costs projected for Tiger II (apart from the Riverside Plant expansion) were \$12.9 million.⁷⁵

38. Despite the failure of the Free Press to meet specific circulation and advertising share goals set either by Tiger I or Tiger II⁷⁶, the two Tiger plans brought the Free Press circulation lead⁷⁷, and throughout 1985 and early 1986 the plans were being defended by Free Press and Knight-Ridder executives as a successful effort that would lead eventually to dominance.⁷⁸

39. At the same time that the Free Press was challenging the News's circulation lead with the Tiger plans, ENA was coming under pressure from dissident shareholders. These dissidents not only believed that ENA may have been undervalued but they were growing increasingly disenchanted with the poor financial performance of the paper as the News adopted costly countermeasures to the Tiger plans in the form of circulation and advertising discounting.⁷⁹ This unrest in turn attracted the attention of a group of outside investors who viewed ENA as ripe for a hostile takeover. As part of its exploratory work, the investors made contact with Knight-Ridder about the prospects for a Detroit JOA. While Knight-Ridder representatives refused to have substantive discussions on

⁷⁵Hall 955, Chapman 2049-52; IX 161Z-21 to Z-23.

⁷⁶Hall 1157-59, 1238-39, Chapman 1792, 1795, 1853, 2016; IX 224C.

⁷⁷Hall 958-59, 1043-44, Clark 1436-37; AX 501A; IX 354B.

⁷⁸Hall 958-59, 1214-15; AX 501A-B, AX 503A-P, AX 504A-Y, AX 505AGG.

⁷⁹Clark 1444-47; NX 100Z-15 P 85 (Chapman); AX 505A; IX 255B.

the question, they told the outside investors that Knight-Rider might be interested in pursuing JOA negotiations should these investors be successful in a take-over attempt.⁸⁰

40. In early August 1985, Peter Clark concluded that ENA could no longer remain a closely-held corporation. He invited Gannett among other to bid for the company. Allen Neuharth, Gannett CEO, agreed in principle to the acquisition and simultaneously contacted Knight-Ridder management to determine if Knight-Ridder was still interested in forming a JOA.⁸¹ Gannett's motivation in pursuing the JOA is plainly shown in an August 1985 internal memorandum:

It appears that the only way this investment could be self-supporting would be through substantial earnings gains at the Detroit News. Obviously, this would be very difficult without a JOA.⁸²

41. In response to the Neuharth initiative, Knight-Ridder informed Gannett of its continuing interest, an assurance which Gannett took into account in formulating its final bid for the ENA stock.⁸⁴

42. Senior officials of Knight-Ridder and Gannett including Chapman and Neuharth met 16 times between August 1985 and April 1986 to discuss the JOA.⁸⁵ At these meetings the parties identified common ground on such issues as duration of a JOA and publication of the Free Press in the morning and the News in the evening. There were, however, differences

⁸⁰NX 400S-T ¶¶ 41-43 (Clark).

⁸¹Neuharth 1599, Chapman 1908; AX 7A.

⁸²IX 165A.

⁸³Chapman 1908.

⁸⁴See AX 558A-F, AX 559A-C, IX 348E-F for evidence that a JOA was part and parcel of Gannett's original planning for the ENA acquisition.

⁸⁵AX 7A; IX 348B-E.

to be resolved. The parties remained apart on issues of structure and control. Gannett, for example, proposed that the Free Press just fold its business operations, leaving Gannett to carry out all production, sales, and distribution functions for both papers.⁸⁶ Knight-Ridder, however, was far from willing to concede that it had lost the great-Detroit newspaper war. This is shown in the January 20, 1986, letter and memorandum from Chapman to Neuhart, the text of which appears in Finding 49.

43. During the JOA negotiations the question was raised as to which newspaper would be presented as the "failing" one and the parties considered the possibility of both applying as failing newspapers.⁸⁷

44. The JOA negotiations were advanced by the parties' recognition that there existed "an economic window of opportunity" which might be closed if both papers became marginally profitable.⁸⁸

45. The JOA negotiation was also advanced by the Free Press's realization that it was not confronted by the deep-pocketed Gannett rather than the independent ENA.⁸⁹ immediately cutting the News's out-state price from 20 cents to 15 cents.⁹⁰

46. As for Gannett, it knew that the news would incur heavy

⁸⁶AX 513A-D.

⁸⁷Neuharth 1654-57, Chapman 2098-2106. See also AX 511A; IX 492.

⁸⁸IX 228B. See also Neuharth 1726, 1732-34, AX 581C. Applicants also believed "that the political climate is right for a JOA". AX 512A. For other evidence of how the filing of a JOA application influences business decisions, see AX 518E in which a 1986 building expansion is delayed because "the announcement of a construction project by the 'failing paper' will be at the least misunderstood by many".

⁸⁹Chapman 1899-1903, 1918, Morton 2343; IX 197A.

⁹⁰See Finding 105.

losses for the foreseeable future so long as it had to compete against Knight-Ridder.⁹¹

47. On April 11, 1986, the Free Press and the News executed a joint newspaper operating agreement while the parent companies simultaneously signed a cooperation and guaranty contract.⁹²

48. The JOA was announced jointly by Knight-Ridder and Gannett on April 14, 1986. They said —

Over a period of more than a quarter century since this became a two-newspaper city, the Free Press and The News have fought to a virtual draw.⁹³

4. *The Status of the Rivalry at The Time of the JOA Application.*

a. *Overview*

49. The public announcement that the JOA reflected a "virtual draw" in the Detroit newspaper war came just four months after Chapman had sent Neuharth the following memorandum (described by Chapman in the accompanying letter as the "ra-

⁹¹Neuharth 1617-18, Chapman 1899-1903, Rosse 2810-11; NX 100Z-40 ¶ 135 (Chapman), NX 300U ¶ 47 (Neuharth). As a matter of corporate strategy, Gannett avoids markets where there is direct daily paper competition. Rosse 2731-32. With the notable exception of its long battle with ENA (and then Gannett) in Detroit, Knight-Ridder has pursued a similar policy. Chapman 1987; IX 173D, IX 265M.

⁹²NX C-2, Ex. 1.

⁹³IX 254A. The claim by Chapman (Chapman 1943-44, 2130-31) that the press release was a sop to the morale of the Free Press staff is contrary to the evidence. At the highest levels of KnightRidder management, the view was held that "The newspapers have fought to a standstill." AX 512A.

tionale supporting our position on the market place strengths of the Free Press compared with the News''):

Private and Confidential

January 20, 1986

Although both the News and the Free Press operate in a difficult economic environment that has produced significant losses over an extended five-year period, an assessment of the relative strength of the two newspapers leads us to the firm conclusion that any agency that may be negotiated, reflecting the reality of the marketplace, must result in a 50/50 arrangement.

The Detroit Free Press is a well-managed newspaper with a loyal readership base and a prove and continuing capacity to expand its reach.

Whether we go all the way back to the early days of a two-paper Detroit market or concentrate on the last few years, the evidence is clear: the Free Press keeps improving its comparative position, and especially among readers who are better educated and better off financially.

There have been blips along the way, but the overall trend is strongly favorable to the Free Press.

The Free Press has a number of competitive advantages. They include:

- We have clear leadership in the critically important morning field.
- Overall readership of the Free Press continues to exceed that of the News.
- There is a high degree of readership duplication, and among duplicate readers the Free Press is Favored by a significant margin.
- In upscale demographic categories, the Free Press is the clear-cut favorite.

- Circulation trends over a 24-year period show dramatic Free Press improvement.
- The Free Press has improved advertising share of field over time.
- We are better printed and are recognized by readers as having better color.
- The Free Press has one of the outstanding young leadership teams in the business.
- Our journalistic peers recognize the Free Press as producing higher quality work.
- The Free Press continues to be the innovative leader in the Detroit field.
- Our new presses, in the light of demonstrated growth potential in the metropolitan area, give us momentum.

A look at some circulation figures should set the stage for further consideration of these points. The numbers below are for the audit year ending March 31, 1985.

<i>Detroit Daily Circulation</i>				
	<i>Detroit Free Press</i>		<i>Detroit News</i>	
	1985	5-year growth	1985	5-year growth
City + RTZ	504,030	38,870	592,056	(111)
AOZ	140,748	752	63,683	26,297
Total	644,778	39,622	655,739	26,186

<i>Detroit Sunday Circulation</i>				
	<i>Detroit Free Press</i>		<i>Detroit News</i>	
	1985	5-year growth	1985	5-year growth
City + RTZ	556,472	61,433	776,739	22,693
AOZ	234,423	17,868	95,280	26,451
	790,895	79,301	872,019	49,144

This shows Free Press growth during the 1980-85 period of 39,622, with almost all of it (38,870) coming in the city Zone

plus the RTZ. During the same period the Detroit News daily growth was 26,186, and it actually grew more than that (26,451) in the AOZ. In the City Zone plus RTZ, the News lost 111. On Sunday, as the table shows, the Free Press outgained the News in the City Zone plus RTZ by 61,433 to 22,693. Even though the News circulation totals are larger, we think the figures reflect the Free Press' increasingly strong competitive position. That becomes clearer as we examine the Free Press advantages listed earlier one by one:

1. *Morning dominance.* We list this first, because it's most important. As your own figures show, Detroit increasingly is a morning market. A recent Chris Urban study (dated March 1985) showed that 60% of those reading both papers actually read the Free Press in the morning, with the remaining 40% reading it later in the day. Only 30% of duplicate readers actually read the News in the morning, with the remaining 70% reading it either in the afternoon or evening. The same study shows that among "loyal" Free Press readers (those reading the paper at least four times a week), 68% read it in the morning. Only "25% of loyal" News readers actually read the News in the morning. We are holding firmly to the morning franchise.
2. *Readership.* Surveys continue to show that the Free Press has greater overall readership. The Urban study mentioned above shows that 30% of Michigan adults read the Free Press on an average daily basis, while the News is read by 28% of Michigan adults daily. A 1985 Simmons-Scarborough study shows the Free Press with 1,880,900 readers in Michigan daily and the News with 1,775,400. On Sunday, according to the study, the Free Press lead in readers is 2,294,300 to 2,186,000.

3. *The duplicate factor.* The Detroit market is one with a high duplicate readership. The Urban study shows that 37% of the average daily audience of the Free Press also reads the News, while 39% of the average daily News audience also reads the Free Press. Among those duplicate readers, the Free Press is the "favorite paper" of 44% and the News is the "favorite paper" of 30%. Also among duplicate readers, 73% are "loyal" Free Press readers compared to 65% who are "loyal" News readers. The survey findings give meaning to a fact that those who work or have worked at the Free Press are aware of: To a remarkable extent, Free Press readers seem to care about it.
4. *Demographics.* The Simmons-Scarborough study shows the Free Press is the dominant daily paper among adults in virtually all upscale demographic categories. The Free Press has more readers than the News among adults in each occupation category: white collar, professional/manager, clerical/sales and blue collar. Between 1978 and 1985 the Detroit-area ADI* was changed from eight counties to nine counties. A comparison of market reach for eight original counties in two Scarborough studies, one for 1978 and one for 1985, shows solid competitive improvement for the Free Press:

		Free Press Daily	News Daily	Free Press Sunday	News Sunday
Percentage market reached	1978	38.1	45.4	38.8	54.1
	1985	40.9	43.0	42.9	52.1
College graduates	1978	48.7	44.1	50.5	51.7
	1985	52.8	44.2	53.4	50.7

* "ADI" refers to Area of Dominant Influence, a nine county (Lapeer, Livingston, Macomb, Monroe, Oakland, Sanilac, St. Clair, Washtenaw and Wayne) measure of demographics in terms of age, income, and occupation. NXC, Appendix I, p. 22, NXC-2, § .22; AX 503D. [ALJ note]

Household income	1978	47.0	50.8	48.5	57.3
\$35,000 and up	1985	47.9	44.6	47.7	54.2
Professionals/	1978	50.2	45.2	51.2	52.6
managers	1985	49.6	46.2	52.6	51.1

5. *Circulation trends.* Similarly, comparing circulation figures from the September 1961 ABC statement, the year after the News bought the Times, with September 1985 figures, shows dramatic Free Press improvement.

	City + RTZ	Change	Total	Change
<i>Free Press</i>				
Daily 1961	421,276		550,000	
Daily 1985	496,339	+ 75,063	634,466	+ 84,466
Sunday 1961	407,891		600,014	
Sunday 1985	532,198	+ 124,307	754,615	+ \$154,601
	City + RTZ	Change	Total	Change
<i>Detroit News</i>				
Daily 1961	694,252	723,578		723,578
Daily 1985	575,657	-118,595	645,016	-78,562
Sunday 1961	738,811		914,523	
Sunday 1985	743,660	- 40,151	837,821	- 76,702

6. *Advertising trends.* Advertising lineage figures mean less than advertising revenue figures, but only lineage is available. Here, too, there is improvement over time. Here are 1961-1985 share of field figures for total advertising lineage:

	Daily	Sunday	Total
<i>Total</i>			
Free Press 1961	37.9%	28.9%	34.3%
Free Press 1985	42.7%	41.1%	41.3%

There have been ups and downs but the trend has been upward.

7. *High quality printing/color.* We are the daily with full offset printing, and our printing quality has had an

effect in the marketplace. Despite the News' heavy investment in color in recent years, the Urban study shows that readers perceive us as having the best color. (Among duplicate readers, for example, 41% say the Free Press has the best color, and only 19% say the News has the best color.)

8. *Quality of Leadership.* The Free Press has built an outstanding leadership team, young but experienced, bright and energetic. David Lawrence is generally recognized as one of the rising newspaper leaders in the country. Jerry Tilis and Bob Hall played major roles in building a winning operation in Philadelphia, and they bring expert metropolitan experience to their current jobs. Joe Stroud carries great respect within Detroit and Michigan and in the profession generally. Kent Berhard is a seasoned newsman with strong organizational skills and a commitment to excellence. Pete Pitz in production and Steve Morris, our new vice president/advertising, are outstanding talents in their fields. the Free Press tradition, going back to Al Neuharth's days there, is to put out an outstanding product with a lean, efficient staff. That's what we're doing now.
9. *Recognition by our peers.* The Free Press has won six Pulitzer Prizes (the News two). In four of the last five years, the Free Press has either won a Pulitzer Prize (once) or been listed as a runner-up. In each of the last two years, the Free Press has won the Michigan Press Association General Excellence Award, has dominated state AP and UPI contests, and has won several top national awards. During recent years the News has won one Pulitzer Prize, and the people who won it now work for the Free Press and the Inquirer.

10. *The cutting-edge tradition.* Even without the circulation lead, the traditional innovator in Detroit journalism has been the Free Press. A few examples come quickly to mind: Action line, offset printing, use of color, Business Monday, the Science/High Tech section, foreign coverage, the visible accent on credibility, pricing. Generally, the Free Press has led the way; the News has followed.
11. *Momentum.* Our recent circulation growth has been concentrated where it counts most, in the metropolitan Detroit area, while News gains have largely been outstate. The demand for late papers reached the point that we decided to invest \$22 million in new press equipment to help satisfy it.

Note: Here's basic information about surveys mentioned in this memorandum:

There are several references to a study done by Urban & Associates for the Free Press, with interviewing done in the latter part of 1984 and results delivered in March of 1985. There were 3,153 respondents from throughout Michigan. The Simmons-Scarborough references are to a national study of 56 ADIs dated this year, with 1,428 interviews in the Detroit ADI. Local sponsors were the Free Press, the News and the Oakland Press. Also referred to was a 1985 Scarborough Report on the nine-county Detroit ADI, involving 2,581 respondents. Sponsors were the Free Press, three TV stations, 14 radio stations, three magazines and three ad agencies. This report was compared to a similar one by the same organization in 1978.⁹⁴

⁹⁴AX 506A-G.

50. Chapman's January 20th memorandum undoubtedly presents the best case for the viability of the Free Press.⁹⁵ But since most measures of newspaper rivalry — total circulation, circulation in key geographical zones ("CZ", "RTZ", "PMA"), lineage, readership, demographics, and circulation revenue — are readily verifiable, there is no basis for assuming that Chapman believed that he could get away with far-fetched claims that would hoodwink Neuharth.⁹⁶ Altogether, the January 20th memorandum was a reasonable summary of the data available at the time.⁹⁷ See Findings 51 to 82.

b. Circulation

51. Although total circulation figures do not tell the whole story of the rivalry between two metropolitan papers (as indicated in Findings 56 to 64, Sunday circulation and circulation in certain key areas or "zones" are particularly important to local retail and classified advertisers who wish to reach the largest possible audience within reasonable travel distance), nevertheless, the record indicates an overriding concern at both the Free Press and the News about total circulation figures. Thus a perceived need to hold or overcome the narrow differences in total circulation has played a key role at both papers in devising marketing strategies, especially in making pricing decisions. Both papers believed that if the Free Press were able to promote itself as the number one daily,

⁹⁵Chapman 1931, 1933-38.

⁹⁶See IX 267A and Chapman 1937-38; NX 100N-Q ¶¶ 32-35 (Chapman). It should also be noted that during the JOA negotiations, the parties exchanged financial information. Neuharth 1613-14.

⁹⁷Chapman acknowledged that considering the deep losses at both papers and "since most of the criteria about which most of the outside world looks at newspapers were very close together. . . a 50/50 profit split would be appropriate for the Free Press." Chapman 1910-11.

this would not only affect staff morale but would also soon change advertiser perception of the two papers' relative commercial value.⁹⁸

52. The News's purchase of the *Detroit Times* in 1960 gave it a substantial lead (183,751) over the Free Press in daily circulation. This lead, however, could not be held for several reasons: the former subscribers of the *Detroit Times* found that the News was a far different paper than the *Times*; the News bore the brunt of a 1967-68 strike and experienced a greater loss than the Free Press as a result of the 1967 riots; the News's lead was vulnerable to the growing preference for morning newspapers; and at least some attrition was attributable to the success of the Tiger initiatives adopted by the Free Press.⁹⁹

53. By 1976, the daily circulation battle has been fought to a virtual tie, and between 1976 and 1986 when combined daily circulation of the two papers grew from 1.25 million copies to over 1.3 million, the Free Press's share of total daily circulation never fell below 49% as shown in Table 5.

⁹⁸Hall 994-95, Clark 1354, 1356, 1385, 1396, 1436-37, 1504-05, 1511-13, Neuharth 1625-26, Morton 2317-18, 2357-58, Nelson 3434; NX 300''I''-J ¶ 25 (Neuharth), NX 400''O'', Z-2 ¶¶ 32, 60 (Clark); IX 134A-B. On a more pragmatic level, when newspapers are sold the selling price is calculated on the basis of \$1200 to \$1300 per subscriber. Neuharth 1536, 1580, 1634.

⁹⁹Findings 14, 16; Clark 1500-02; NX 400E-F ¶ 13 (Clark).

Table 5: Combined Free Press and News Daily Circulation (1960-1987) And Free Press Share (%)

	(Combined Free Press and News Circulation)	(Free Press Share)
1960*	1,344,986	36.5%
1961	1,109,207	47.4%
1962	1,256,172	42.3%
1963	1,221,972	41.6%
1964	1,219,038	42.1%
1965	1,179,596	41.8%
1966	1,198,163	42.5%
1967	1,236,979	44.1%
1968	1,293,480	45.8%
1969	1,141,485	46.6%
1970	2,201,958	47.9%
1971	1,239,509	47.9%
1972	1,230,759	47.0%
1973	1,269,592	47.4%
1974	1,301,685	47.3%
1975	1,272,044	48.9%
1976	1,250,233	49.8%
1977	1,255,837	49.4%
1978	1,246,558	49.3%
1979	1,245,606	49.3%
1980	1,234,709	49.0%
1981	1,232,450	49.4%
1982	1,247,626	50.0%
1983	1,280,880	49.5%
1984	1,283,070	49.3%
1985	1,300,517	49.6%
1986	1,283,264	49.8%
1987	1,327,698	48.8%

Notes: Daily figures are an average of Monday-Saturday data from 1960 to 1974, and of Monday-Friday data thereafter. When separate data were reported for different periods within the year, the figure shown is a weighted average.

**Detroit Times* circulation is included in 1960 combined figure.

Source: JX 1.

54. For the six months ending March 31, 1986 — the last period reported before the JOA was announced — the News's margin had been reduced to slightly more than 5,000¹⁰⁰, and there is persuasive evidence that on or about the date of the announcement of the JOA, the Free Press had all but eliminated the News's daily circulation lead.¹⁰¹

55. In the last months of 1986 and the first quarter of 1987, there was a sudden surge in favor of the News which resulted in a widening of the daily circulation gap. This was fairly predictable and is consistent with the history of other JOA's which shows that once an agreement is announced it has an adverse effect on the morale and performance of the designated "failing newspaper".¹⁰² The surge in the News's daily circulation is also attributable at least in part to a significant increase in the News's competitive vigor following the Gannett acquisition (as shown by promotions and discounting), which occurred at the very time that the Free press was cutting back in the same areas.¹⁰³

56. While the News was not able to hold onto the combined News—*Detroit Times* Sunday readership, over the years the Free Press has not done nearly as well in challenging the News's Sunday lead as it has in the daily circulation battle. This is shown in Table 6.

¹⁰⁰JX 1. See also IX 262A-B for evidence of News apprehension about the prospects of losing the circulation lead by the third quarter of 1986. For other indications of Free Press gains in early 1986, see IX 258.

¹⁰¹IX 270A-B, IX 272A, IX 303A.

¹⁰²Hall 1341-42, Clark 1518, Neuharth 1733-34, Chapman 2117-18, Morton 2312; AX 516A-C, AX 519A-C; IX 236A-D, IX 274D, IX 281A, IX 282B.

¹⁰³Hall 1050-52, 1057, 1165; AX 519A-C, AX 529A-C, AX 530A-B, AX 531A, AX 532, AX 539A-C, AX 541A; IX 274B-D. The News also gained circulation from its cut in the out-state daily price. NX 300J-K ¶ 27 (Neuharth).

Table 6: Combined Free Press And News Sunday Circulation (1960-1987) And Free Press Share (%)

	(Combined Free Press and News Circulation)	(Free Press Share)
1960*	1,597,126	32.7%
1961	1,323,291	42.5%
1962	1,511,793	38.8%
1963	1,498,370	37.7%
1964	1,506,163	38.0%
1965	1,478,388	37.5%
1966	1,491,219	37.6%
1967	1,542,653	38.6%
1968	1,582,599	40.1%
1969	1,408,653	41.4%
1970	1,480,484	42.7%
1971	1,508,621	43.0%
1972	1,518,569	44.2%
1973	1,547,149	45.5%
1974	1,569,475	46.0%
1975	1,560,609	47.4%
1976	1,561,415	47.4%
1977	1,533,854	46.6%
1978	1,536,014	46.7%
1979	1,534,646	46.3%
1980	1,534,469	46.4%
1981	1,553,901	46.9%
1982	1,578,060	47.9%
1983	1,625,385	47.7%
1984	1,646,552	47.8%
1985	1,662,914	47.6%
1986	1,583,360	47.3%
1987	1,575,385	46.7%

Note: **Detroit Times* Circulation is included in 1960 combined figure.

Source: JX 2.

57. The fight for Sunday circulation reflects the importance of this edition. The Sunday paper not only has the largest cir-

ulation and the most editorial material and advertising, but it is also the edition that is perused the longest by readers. For all these reasons, advertisers are willing to spend more for space in the Sunday edition.¹⁰⁴

58. Apart from daily and Sunday circulation, newspaper competition is measured by performance in certain key areas or "zones" — the Primary Market Area ("PMA"), The City Zone ("CZ"), and The Retail Trade Zone ("RTZ").¹⁰⁵ These areas are important because retail and classified advertisers are most interested in reaching readers who live or work within the area where the advertisers themselves are located. Conversely, retailers and classified advertisers are unwilling to pay as much to have their message delivered to readers who are too remote from them to be likely potential customers.¹⁰⁶

59. As indicated in Finding 9, the Primary Market Area ("PMA") consists of Wayne, Macomb, and Oakland counties. Over 87% of the population of the Detroit metropolitan area and about 41% of Michigan's total population resides in the Detroit PMA. In addition, the Detroit PMA accounts for about 50% of Michigan's personal income. The three-county PMA is the area of most importance to local Detroit advertisers — i.e., those who provide more than 75% of the revenue to both the Free Press and News.¹⁰⁷

¹⁰⁴NX 100L-N ¶¶ 27, 31 (Chapman).

¹⁰⁵Hall 1040; NX 100Z-13 ¶ 79 (Chapman), NX 200L-M ¶ 28, (Hall), NX 300'I'-J ¶ 25 (Neuharth).

¹⁰⁶NX 100S ¶ 40 (Chapman), NX 700U-V, Z-16 to Z-17 ¶¶ 32, 69 (Morton); AX 515A.

¹⁰⁷NX C-1, p. 4.

60. Trends within the PMA are the most reliable and important indicators of circulation strength.¹⁰⁸ Although the News enjoys a lead in daily PMA circulation, at least prior to 1987 there was evidence of a strong trend favorable to the Free Press. Between 1980 and 1986, the Free Press's share of daily PMA circulation increased from 42.7% to 45.7%, representing a gain of 36,000 for the Free Press, and a loss of 22,000 for the News as shown in Table 7.

61. While the Free Press has made gains against the News's Sunday lead in the PMA, the News still has a substantial lead as shown in Table 8.

62. The Detroit City Zone ("CZ") consists of the corporate limits of the city and the immediately adjacent areas in Wayne, Macomb, and Oakland counties. The Detroit Retail Zone ("RTZ") embraces those parts of Wayne, Macomb, and Oakland not included in the CZ as well as Monroe, Livingston, and Washtenaw counties, and nearby areas in Canada. Apart from the PMA, the CZ and RTZ are generally regarded as the geographic areas that metropolitan Detroit retailers are most interested in reaching because this is where most of their prospective customers live.¹⁰⁹

63. The CZ and RTZ, which traditionally have been the areas of News strength,¹¹⁰ are usually reported together as shown in Tables 9-10.

¹⁰⁸Rosse 2681-82, 2685, 2738, 2814; NX 400V-W ¶ 50 (Clark). A sudden increase in the News's lead in daily PMA circulation for the period ending March 31, 1987, is attributable to the factors cited in Finding 55.

¹⁰⁹Clark 1463; NX C-1, Appendix I, pp. 26, 28, NX C-5 ¶ 1C, NX 100'O'-P ¶ 33 (Chapman), NX 700Z-17 to Z-18 ¶¶ 70-71 (Morton); IX 126K.

¹¹⁰Nelson 3417-18, 3420-21.

Table 7
Combined Free Press And News Daily Circulation (1960-1987)
In PMA Counties And Free Press Share(%)

	(Combined Circulation)				(Free Press Share)			
	MACOMB	OAKLAND	WAYNE	PMA TOTAL	MACOMB	OAKLAND	WAYNE	PMA TOTAL
1960*	109,415	140,041	894,078	1,143,534	27.5%	37.8%	28.7%	19.7%
1961	108,942	141,375	862,437	1,112,754	31.3%	42.5%	37.4%	37.5%
1962	108,445	145,001	817,164	1,070,611	28.8%	42.9%	35.6%	35.9%
1963	111,902	138,760	792,587	1,043,249	29.3%	43.2%	34.4%	35.0%
1964	114,410	138,891	784,750	1,038,051	28.6%	42.7%	34.8%	35.2%
1965	112,041	137,962	762,713	1,011,816	29.6%	44.0%	34.0%	34.9%
1966	119,977	143,159	760,992	1,024,128	30.9%	44.5%	34.7%	35.6%
1967	129,113	152,551	768,185	1,049,849	33.6%	45.1%	35.9%	37.0%
1968	136,819	166,271	786,616	1,089,706	34.8%	46.8%	37.6%	38.7%
1969	124,120	150,445	685,979	960,544	34.7%	49.1%	38.5%	39.7%
1970	139,449	167,069	707,779	1,014,297	37.9%	49.7%	39.1%	40.7%
1971	143,677	176,029	714,087	1,033,793	36.2%	50.0%	38.9%	40.4%
1972	149,137	178,239	703,129	1,030,505	36.3%	50.5%	37.7%	39.7%
1973	159,605	188,610	714,937	1,063,152	37.3%	49.4%	38.2%	40.1%
1974	170,950	197,070	724,090	1,092,110	38.3%	50.3%	38.0%	40.3%
1975	167,104	206,999	691,396	1,065,499	39.0%	49.9%	39.9%	41.7%
1976	166,605	196,871	676,774	1,040,250	39.9%	53.8%	39.9%	42.5%

1977	174,286	199,116	664,725	1,038,127	39.3%	54.1%	39.6%	42.3%
1978	176,071	204,416	646,617	1,027,104	38.7%	54.2%	39.8%	42.5%
1979	178,739	211,777	631,690	1,022,206	38.5%	53.8%	40.2%	42.7%
1980	178,282	209,444	623,658	1,011,384	38.2%	54.1%	40.2%	42.7%
1981	177,935	211,414	615,792	1,005,141	38.1%	54.3%	40.9%	43.2%
1982	181,670	215,321	615,475	1,012,466	38.7%	55.2%	42.1%	44.3%
1983	183,405	221,914	623,844	1,029,163	39.6%	54.3%	42.0%	44.2%
1984	184,377	227,077	619,683	1,031,137	39.0%	54.2%	42.3%	44.3%
1985	189,856	235,550	617,500	1,042,906	40.2%	54.0%	43.0%	45.0%
1986	188,965	234,797	601,864	1,025,626	41.1%	53.4%	44.1%	45.7%

Notes: Daily figures are an average of Monday-Saturday data from 1960 to 1974, and of Monday-Friday data thereafter. When separate data were reported for different periods within the year, the figure shown is a weighted average.

*Detroit Times circulation is included in 1960 combined figure.

Source: JX 3.

Table 8
Combined Table 8: Combined Free Press and News Sunday Circulation (1960-1987)
In PMA Counties and Free Press Share (%)

	(Combined Total)				(Free Press Share)			
	MACOMB	OAKLAND	WAYNE	PMA TOTAL	MACOMB	OAKLAND	WAYNE	PMA TOTAL
1960*	123,560	178,174	902,639	1,204,373	24.3%	33.3%	25.3%	26.4%
1961	119,763	179,446	863,286	1,162,495	28.4%	37.5%	34.3%	34.2%
1962	120,383	183,662	821,042	1,125,087	25.9%	37.0%	32.2%	32.3%
1963	126,126	181,304	806,823	1,114,253	26.0%	36.2%	30.3%	30.8%
1964	130,071	183,151	806,746	1,119,968	24.8%	35.5%	30.4%	30.6%
1965	132,715	187,784	794,136	1,114,635	24.9%	36.3%	29.5%	30.1%
1966	140,457	194,164	796,327	1,130,948	25.8%	36.7%	29.5%	30.3%
1967	150,820	205,277	812,532	1,168,629	27.7%	37.1%	30.2%	31.1%
1968	157,619	216,806	817,427	1,191,852	29.1%	38.6%	31.6%	32.5%
1969	150,555	200,064	726,110	1,076,729	28.6%	31.7%	32.6%	33.7%
1970	167,476	218,138	753,907	1,139,521	32.2%	41.8%	33.2%	34.7%
1971	170,178	225,972	749,968	1,146,118	30.5%	42.8%	32.8%	34.4%
1972	176,348	229,307	754,478	1,160,133	32.3%	44.4%	33.0%	35.2%
1973	185,050	237,330	759,045	1,181,425	34.2%	44.8%	34.1%	36.3%
1974	196,010	246,594	760,993	1,203,597	35.0%	46.5%	34.3%	36.9%
1975	196,335	260,755	738,746	1,195,836	35.7%	46.1%	36.1%	38.2%

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1976	199,381	255,211	740,930	1,195,522	36.1%	48.7%	35.2%	38.2%
1977	204,425	253,477	718,928	1,176,200	35.0%	48.7%	34.4%	37.6%
1978	206,758	261,733	705,352	1,173,843	34.6%	49.1%	34.4%	37.7%
1979	213,054	262,867	698,722	1,174,643	34.2%	48.7%	34.5%	37.6%
1980	212,965	265,188	695,993	1,174,146	34.1%	48.2%	35.1%	37.9%
1981	215,509	265,935	704,578	1,186,022	33.8%	49.2%	35.8%	38.4%
1982	219,315	278,969	702,999	1,201,283	35.0%	49.2%	37.6%	39.8%
1983	226,318	280,066	720,556	1,226,940	35.6%	49.4%	37.4%	39.8%
1984	227,526	288,439	722,256	1,238,221	35.5%	49.6%	37.7%	40.1%
1985	232,939	299,662	718,007	1,250,608	36.2%	48.7%	38.1%	40.3%
1986	227,782	288,558	683,841	1,200,181	36.4%	47.6%	38.7%	40.4%

Note: *Detroit times circulation is included in 1960 combined figure.

Source: JX 4.

Table 9
Combined Free Press And News Daily Circulation (1960-1987)
In The CZ and RTZ And Free Press Share (%)

	(Combined Free Press and News Circulation)				(Free Press Share)		
	CZ	RTZ	CZ + RTZ	CZ	RTZ	CZ + RTZ	
1960*	709,162	473,749	1,182,911	29.7%	32.3%	30.8%	
1961	553,168	411,167	964,335	42.2%	40.6%	41.6%	
1962	632,943	474,023	1,106,966	36.9%	37.0%	36.9%	
1963	606,312	471,818	1,078,130	35.3%	37.0%	36.1%	
1964	592,852	480,050	1,072,902	35.8%	37.0%	36.3%	
1965	569,220	475,630	1,044,850	35.1%	37.2%	36.1%	
1966	565,117	493,224	1,058,341	35.6%	38.1%	36.7%	
1967	561,946	526,687	1,088,633	36.6%	40.1%	38.3%	
1968	570,496	557,299	1,127,795	37.9%	41.9%	39.9%	
1969	483,040	510,640	993,680	39.0%	42.4%	40.8%	
1970	492,777	557,448	1,050,225	39.5%	44.2%	42.0%	
1971	490,986	585,321	1,076,307	39.1%	44.1%	41.8%	
1972	472,891	598,679	1,071,570	37.9%	43.5%	41.0%	
1973	477,104	629,873	1,106,977	38.0%	44.2%	41.5%	
1974	473,931	661,443	1,135,374	37.6%	44.2%	41.4%	
1975	454,804	654,284	1,109,088	38.9%	46.0%	43.1%	
1976	434,117	649,793	1,083,910	39.7%	46.7%	43.9%	

1977	416,839	665,187	1,082,026	39.4%	46.3%	43.7%	
1978	408,474	662,946	1,071,420	38.5%	47.0%	43.8%	
1979	386,675	680,310	1,066,985	40.2%	46.2%	44.0%	
1980	377,919	679,408	1,057,327	40.3%	46.1%	44.0%	
1981	372,579	678,822	1,051,401	41.1%	46.2%	44.4%	
1982	368,935	690,190	1,059,125	42.5%	47.0%	45.4%	
1983	375,944	702,385	1,078,329	42.3%	46.9%	45.3%	
1984	373,332	706,940	1,080,272	42.8%	46.7%	45.4%	
1985	368,002	728,084	1,096,086	43.0%	47.5%	46.0%	
1986	355,300	726,154	1,081,454	43.7%	48.0%	46.6%	
1987	360,377	739,536	1,099,912	43.4%	47.5%	46.2%	

Notes:

Daily figures are an average of Monday-Saturday data from 1980 to 1974, and of Monday-Friday data thereafter. When separate data were reported for different periods within the year, a figure shown is a weighted average.

* *Detroit Times* circulation is included in 1960 combined figure.

Source: JX 1.

Table 10
Combined Free Press And News Sunday Circulation (1960-1987)
In The CZ and RTZ And Free Press Share (%)

	(Combined Free Press and News Circulation)				(Free Press Share)		
	CZ	RTZ	CZ + RTZ	CZ	RTZ	CZ + RTZ	
1960*	701,540	572,598	1,274,138	25.9%	29.2%	27.4%	
1961	558,697	497,490	1,056,188	36.2%	36.6%	36.4%	
1962	626,625	572,683	1,199,308	33.2%	33.9%	33.5%	
1963	608,601	579,318	1,187,919	30.9%	33.1%	32.0%	
1964	600,643	591,402	1,192,045	31.0%	32.7%	31.8%	
1965	586,888	599,020	1,185,908	30.0%	32.7%	31.4%	
1966	583,494	621,349	1,204,843	29.8%	33.2%	31.6%	
1967	589,145	658,947	1,248,092	30.5%	34.4%	32.6%	
1968	585,697	685,131	1,270,828	31.4%	35.9%	33.8%	
1969	501,913	641,130	1,143,043	32.6%	36.9%	35.0%	
1970	517,597	690,899	1,208,496	33.0%	38.4%	36.1%	
1971	510,259	711,696	1,221,955	32.6%	38.6%	36.1%	
1972	500,908	733,652	1,234,560	32.8%	39.7%	36.9%	
1973	501,262	757,340	1,258,602	33.3%	41.4%	38.2%	
1974	491,210	791,347	1,282,557	33.6%	42.0%	38.8%	
1975	477,029	795,914	1,272,943	34.8%	43.4%	40.2%	
1976	465,892	805,173	1,271,065	34.6%	43.3%	40.1%	

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1977	441,056	808,349	1,249,405	33.5%	42.5%	39.3%	
1978	438,335	809,048	1,247,383	32.4%	43.2%	39.4%	
1979	419,855	827,744	1,247,599	33.5%	42.3%	39.3%	
1980	417,987	831,098	1,249,085	34.2%	42.4%	39.6%	
1981	419,135	842,048	1,261,183	35.2%	42.6%	40.1%	
1982	417,527	860,258	1,277,785	37.0%	43.6%	41.4%	
1983	425,007	880,847	1,305,854	37.1%	43.4%	41.3%	
1984	426,128	892,472	1,318,600	37.8%	43.4%	41.6%	
1985	412,478	911,733	1,333,211	37.4%	43.7%	41.7%	
1986	393,843	886,675	1,280,518	37.8%	43.6%	41.9%	
1987	387,323	887,410	1,274,733	38.3%	43.6%	42.0%	

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Notes: *Detroit Times circulation is included in 1960

Source: JX 2.

64. As seen in Table 9, there was a trend favorable to the Free Press in the CZ and RTZ prior to late 1986 and early 1987. This was confirmed in the following May 1986 assessment made by the News —

1. *Free Press* suffered losses outstate and gains in City and RTZ where we suffered substantial losses.
2. Continuation of this trend will adversely affect our advertising share of field.
3. Historically, losses in the city remain a very serious problem.
4. Past history indicates that if we do not reverse this figure by 9/30 the *Free Press* could lead us daily.
5. Overall, we are suffering a deterioration in the city and RTZ which has historically been our strength.¹¹¹

65. The All Other Zone ("AOZ") consists of the Michigan areas not covered by the PMA, CZ, or RTZ. This zone is often referred to as "out-state" to signify its removal from the Detroit area. The AOZ is not considered as important as the PMA, CZ, or RTZ because of the cost of serving it and its relatively low value to the retail and classified advertisers that form the backbone of a metropolitan daily.¹¹² The Free Press has consistently held the leadership in the AOZ with almost twice as many readers as the News.¹¹³

66. The Free Press's lower circulation levels in the PMA, CZ, and RTZ result in lower household penetration rate, still

¹¹¹IX 262B. See also Hall 1041-42, IX 263A-B. As indicated in Table 10, the favorable trend for the Free Press in the CZ and RTZ even continued into 1987 for Sunday circulation.

¹¹²NX C-1, Appendix I, p. 26, NX 800G ¶ 7 (Rosse).

¹¹³Clark 1386.

another indicator of relative attractiveness. The paper with the lower penetration rate is considered by many advertisers as the second and therefore less desirable buy.¹¹⁴

67. Newspapers and advertisers also tend to regard home delivery circulation as more valuable than single copy ("street") sales. Bad weather, holidays, and other factors may adversely affect street sales more than home deliveries. In addition, advertisers believe that their messages are more likely to be read and used by those taking home delivery. Furthermore, several members of the household typically read a newspaper delivered to the home whereas a single copy sale may or may not be taken home. Also, home delivered circulation unlike single copy sales can be directed at specific demographic groups.¹¹⁵ Prior to the announcement of the JOA, the Free Press had actually taken the lead in CZ and RTZ daily home delivery, and had showed some progress in Sunday home delivery as seen in Table 11.

68. The Free Press maintains its huge leadership "in the critically important field".¹¹⁶ It is by far Michigan's largest morning paper.¹¹⁷

69. At least until 1986, the Free Press had higher readership (total number of readers of each copy), greater circulation among the upscale consumers (in terms of education, occupation, and income) who are favored by most advertisers, and was the paper preferred by duplicate readers.¹¹⁸ The

¹¹⁴NX C-1, Appendix I, pp. 32-34, NX 100L ¶ 26 (Chapman), NX 700W-X ¶ 36 (Morton), NX 800Z-44 ¶ 128 (Rosse).

¹¹⁵NX C-1, Appendix I, pp. 33-34, NX 100P ¶ 34 (Chapman), NX 700X-Y, Z-20 ¶¶ 37, 75 (Morton), NX 800H ¶ 7, (Rosse).

¹¹⁶Chapman 1934; AX 506D.

¹¹⁷NX A, p. 62.

¹¹⁸Hall 979, 1187-88, Morton 2318-19; NX 203H; AX 503D, AX 506D-E, AX 569F, K; IX 85A-L, IX 119B, IX 237B.

Table 11
Combined Free Press And News Home Delivery Circulation (1960-1987)
In CZ and RTZ and Free Press Share (%)

	Daily			Sunday		
	(Combined Total)		(Free Press Share)	(Combined Total)		(Free Press Share)
	CZ	CZ + RTZ	CZ	CZ + RTZ	CZ	CZ + RTZ
1960*	593,736	1,066,910	26.6%	628,861	1,188,525	25.1%
1961	458,661	869,319	37.8%	491,371	977,021	34.9%
1962	542,173	1,015,750	34.1%	566,353	1,121,860	32.7%
1963	516,020	987,461	31.6%	549,434	1,112,658	29.8%
1964	507,681	987,374	32.0%	543,582	1,120,794	29.9%
1965	491,253	966,588	31.4%	533,883	1,115,139	29.0%
1966	484,771	977,785	31.3%	529,832	1,134,388	28.7%
1967	472,542	998,989	31.0%	527,954	1,168,109	28.7%
1968	471,069	1,028,149	31.5%	523,489	1,192,240	29.4%
1969	397,608	908,028	32.5%	445,809	1,061,723	30.5%
1970	408,043	965,352	33.6%	461,887	1,127,069	31.5%
1971	405,492	990,087	33.5%	455,268	1,144,795	31.3%
1972	400,196	997,847	33.7%	449,175	1,147,382	31.2%
1973	404,040	1,033,161	33.6%	455,590	1,167,701	32.2%
1974	428,648	1,065,131	41.7%	444,168	1,165,148	37.3%
1975	408,471	1,037,456	43.2%	428,541	1,144,748	38.7%

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1976	390,749	1,014,321	43.9%	415,259	1,134,723	38.9%	42.0
1977	374,170	1,008,332	43.3%	391,893	1,121,253	37.8%	41.9
1978	367,060	1,001,403	42.5%	386,458	1,114,903	36.8%	42.0
1979	342,452	983,412	44.9%	362,623	1,101,519	38.7%	42.5
1980	332,292	965,691	45.4%	357,411	1,084,680	40.0%	42.7
1981	327,398	956,670	46.4%	359,796	1,082,608	41.0%	43.0
1982	326,011	966,605	47.7%	361,902	1,093,187	42.6%	43.8
1983	332,767	981,418	47.5%	372,391	1,119,825	42.4%	43.5
1984	331,554	983,624	47.8%	374,148	1,124,028	43.0%	43.4
1985	329,579	997,371	47.5%	371,905	1,139,612	42.4%	44.0
1986	315,362	957,741	48.5%	349,470	1,091,895	42.6%	45.9
1987	357,577	1,093,104	43.0%	387,133	1,274,350	38.2%	42.0%

Notes:

Daily figures are an average of Monday-Saturday data from 1960 to 1974, and of Monday-Friday data thereafter.
 When separate data were reported for different periods within the year, the figure shown is a weighted average.

**Detroit Times* circulation is included in 1960 combined figure.

Source: JX 6.

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results for 1986, however, indicate that the Free Press's lead in demographics is vulnerable to competitive pressures.¹¹⁹

c. Circulation and Advertising Revenues

70. Head-to-head competition between two metropolitan newspapers is also measured by circulation and advertising revenues. Of the two, advertising revenues, which are determined on the basis of prices ("rates") paid and the quantity ("linage") sold, is by far the most important source of revenues for both newspapers, accounting for approximately 72% of the Free Press's total revenues and 81% of the News's.¹²⁰

71. The Free Press's circulation revenues (as shown in Table 12) exceeded those of the News mainly because the daily price of the Free Press was 5¢ higher than the price of the News.

72. While the News' lead in advertising revenues has been eroded since 1963, it still is substantial as seen in Table 13.¹²¹ The Free Press' best performance, a 40.6% share in 1983, was followed by two years of decline, followed in turn by only a marginal gain in 1986 which still left it below its 1983 share.

¹¹⁹NX 4K, NX 200Z-5 to Z-6 ¶ 64 (Hall), NX 205A-B, NX 800Z-18 ¶ 71 (Rosse).

¹²⁰NX 100G-H ¶¶ 15-16 (Chapman).

¹²¹The News's discounting policy has been a key deterrent to any substantial advertising gains by the Free Press. See Findings 109-111.

d. Linage

73. In reporting the results of the "linage" (volume of advertising) competition, newspapers traditionally refer to share of run of press advertising ("ROP") which is printed on the newspaper's own presses in contrast to "preprints" or "inserts" prepared by others and merely distributed with the paper. Competition for advertising lineage also frequently refers to "full-run" advertising which is circulated to all of the newspaper's readers in contrast to "part-run" advertising which is only distributed to a portion of the total circulation.¹²² Examples of "part-run" advertising are the ads appearing in a paper's zoned editions, typically news sections of interest to readers in a limited geographic area.¹²³

74. The News leads in daily and Sunday total full-run and full-run ROP lineage as shown in Tables 14-15.

¹²²NX A, p. 28, NX 100J ¶ 21 (Chapman). Full-run advertising produces 85% of the Free Press's advertising revenue, and 87% of the News's revenue. Part-run advertising produces 7% of the Free Press's advertising revenues and 3.8% of the News's revenue. A substantial Free Press lead in part-run advertising was erased by the News between 1985 and 1986. JX 22, JX 25. Preprints account for 8% of the Free Press's revenue and 14.9% of the News's total. NX 613A-B.

¹²³Hall 930; NX A, p. 28. Zoned editions are used by local merchants who have targeted a specific geographic area and therefore do not wish to incur the higher prices charged for reaching the general ("full-run") circulation. NX 100'I'-J ¶ 20 (Chapman).

Table 12: Combined Free Press and News Circulation Revenue (1963-1986) (in thousands of dollars) and Free Press Share (%)

	(Combined Free Press and News Circulation Revenue)	(Free Press Share) Share)
1963	\$34,546	39.7%
1964	\$23,673	38.9%
1965	\$35,837	39.2%
1966	\$37,169	40.5%
1967	\$34,029	42.6%
1968	\$15,055	45.8%
1969	\$40,841	44.7%
1970	\$43,439	45.0%
1971	\$47,948	48.5%
1972	\$50,869	48.6%
1973	\$50,980	49.1%
1974	\$55,235	49.5%
1975	\$59,502	50.0%
1976	\$67,372	49.8%
1977	\$66,796	50.4%
1978	\$66,608	50.3%
1979	\$67,605	51.1%
1980	\$69,986	52.8%
1981	\$72,343	53.6%
1982	\$74,204	53.6%
1983	\$75,189	53.3%
1984	\$76,901	53.3%
1985	\$87,923	52.6%
1986	\$89,853	51.1%

Note: Data for 1963-1975 are not necessarily consistent from year to year or between the papers due to possible classification or accounting policy differences or changes.

Source: JX 12.

Table 13: Combined Free Press and News Advertising Revenue (1963-1986) (in thousands of dollars) and Free Press Share (%)

	(Combined Advertising Revenue)	(Free Press Share)
1963	\$61,640	30.2%
1964	\$43,037	29.5%
1965	\$74,498	29.8%
1966	\$82,518	30.2%
1967	\$71,498	30.7%
1968	\$34,894	31.6%
1969	\$90,245	31.6%
1970	\$90,388	30.6%
1971	\$97,525	30.6%
1972	\$111,978	31.3%
1973	\$125,246	32.6%
1974	\$130,935	34.8%
1975	\$135,088	35.6%
1976	\$151,942	36.7%
1977	\$172,236	37.1%
1978	\$194,546	37.0%
1979	\$209,928	37.6%
1980	\$207,203	38.1%
1981	\$223,991	38.0%
1982	\$217,879	39.7%
1983	\$234,858	40.6%
1984	\$263,146	39.8%
1985	\$291,225	38.5%
1986	\$312,348	38.9%

Note: Data for 1963-1975 are not necessarily consistent from year to year or between the papers due to possible classification or accounting policy differences or changes.

Table 14
Combined Free Press and News Total Full-Run Advertising Linage (1960-1986)
and Free Press Share (%)

	DAILY		SUNDAY		TOTAL	
	COMBINED TOTAL	FREE PRESS SHARE (%)	COMBINED TOTAL	FREE PRESS SHARE (%)	COMBINED TOTAL	FREE PRESS SHARE (%)
1960	53,650,158	29.8%	21,235,374	23.3%	74,885,532	27.9%
1961	42,780,049	36.9%	17,388,823	28.0%	60,168,872	34.3%
1962	39,919,894	36.1%	16,423,917	26.9%	56,343,811	33.4%
1963	45,326,112	36.5%	18,338,800	28.5%	63,664,912	34.2%
1964	31,213,229	36.5%	12,672,403	28.3%	43,885,632	34.1%
1965	55,560,652	36.8%	21,694,501	28.6%	77,255,153	34.5%
1966	58,851,430	36.8%	24,410,692	29.9%	83,262,122	34.8%
1967	49,010,090	37.2%	21,198,908	29.0%	70,208,998	34.7%
1968	22,616,983	36.9%	9,901,032	29.9%	32,518,015	34.8%
1969	54,937,523	37.1%	24,561,062	30.9%	79,498,585	35.2%
1970	49,779,353	36.4%	23,077,868	30.5%	72,857,221	34.5%
1971	49,764,327	35.7%	23,696,481	31.2%	73,460,808	34.2%
1972	54,062,552	37.4%	26,382,736	30.6%	80,445,288	35.2%
1973	57,064,394	38.1%	26,593,908	31.6%	83,658,302	36.0%
1974	54,042,233	39.6%	26,148,107	34.3%	80,190,340	37.9%

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1975	56,139,439	40.9%	25,639,040	33.0%	81,778,479	38.4%
1976	63,853,014	43.1%	27,593,982	33.7%	91,446,996	40.3%
1977	65,189,517	42.9%	30,234,470	32.6%	95,423,987	39.6%
1978	69,324,590	42.4%	33,134,916	33.3%	102,459,505	39.5%
1979	68,206,222	42.5%	33,256,755	34.2%	101,462,977	39.8%
1980	61,695,069	40.9%	29,620,754	34.2%	91,315,822	38.7%
1981	57,819,379	42.2%	27,681,404	33.4%	85,500,783	39.4%
1982	51,615,952	43.1%	24,358,538	33.0%	75,974,490	39.9%
1983	51,965,514	43.0%	27,443,123	33.8%	79,408,637	39.8%
1984	54,065,200	42.6%	29,884,914	32.6%	83,950,114	39.1%
1985	59,781,519	40.0%	31,835,866	35.3%	91,617,385	38.4%
1986	63,430,157	39.0%	34,263,156	35.4%	97,693,313	37.8%

63a

Notes: 1960-1974 in 8-column format, 1975-1986 in 9-column format. Detroit Times lineage is included in Combined Total in 1960.

Source: JX 19.

Table 15
Combined Free Press and News Full-Run ROP Advertising Linage (1960-1986)
and Free Press Share (%)

	DAILY		SUNDAY		TOTAL	
	COMBINED TOTAL	FREE PRESS SHARE (%)	COMBINED TOTAL	FREE PRESS SHARE (%)	COMBINED TOTAL	FREE PRESS SHARE (%)
1960	NA	NA	NA	NA	NA	NA
1961	NA	NA	NA	NA	NA	NA
1962	NA	NA	NA	NA	NA	NA
1963	NA	NA	NA	NA	NA	NA
1964	NA	NA	NA	NA	NA	NA
1965	NA	NA	NA	NA	NA	NA
1966	NA	NA	NA	NA	NA	NA
1967	NA	NA	NA	NA	NA	NA
1968	NA	NA	NA	NA	NA	NA
1969	NA	NA	NA	NA	NA	NA
1970	NA	NA	NA	NA	NA	NA
1971	48,360,503	36.6%	17,700,030	28.1%	66,060,533	34.3%
1972	52,465,024	38.2%	19,446,419	27.4%	71,911,443	35.2%
1973	55,699,476	38.9%	20,870,991	29.2%	76,570,467	36.2%

64a

1974	53,425,529	40.0%	20,724,961	32.4%	74,150,490	37.9%
1975	55,403,219	41.4%	20,855,046	31.2%	76,258,265	38.7%
1976	62,841,419	43.7%	22,511,523	32.4%	85,352,942	40.7%
1977	63,820,339	43.7%	24,359,846	30.5%	88,180,185	40.0%
1978	67,617,434	43.5%	26,984,482	31.5%	94,601,915	40.1%
1979	66,021,504	43.9%	26,875,999	32.7%	92,897,503	40.7%
1980	59,589,106	42.3%	23,800,084	33.4%	83,389,189	39.8%
1981	56,993,543	42.9%	22,824,629	33.1%	79,818,172	40.1%
1982	50,758,516	43.8%	19,333,265	34.7%	70,091,781	41.3%
1983	50,599,054	43.9%	21,324,432	34.7%	71,923,486	41.2%
1984	52,659,798	43.8%	23,098,558	33.4%	75,758,356	40.6%
1985	58,117,023	40.9%	26,026,322	35.2%	84,143,345	39.1%
1986	62,149,421	39.8%	27,158,344	36.5%	89,307,765	38.8%

65a

Notes: 1960-1974 in 8-column format, 1975-1986 in 9-column format.

Source: JX 13.

75. As shown in Tables 14-15, there is no indication of any favorable trend for the Free Press in share of total full-run or ROP full-run advertising lineage. To the contrary, in each year since 1982 Free Press daily share has declined. Slight improvement in Free Press share of total Sunday full-run and Sunday full-run ROP advertising lineage in 1985 and 1986 would appear to be largely a function of how far back the Free Press was to begin with in the Sunday competition as well as the loss of some Sunday circulation by the News in the PMA following the 1985 circulation price increase.¹²⁴

76. Competition for lineage share between newspapers is also broken down by kinds of advertising — "retail", "general", and "classified". "Retail" is displayed advertising from local merchants such as department and grocery stores. "General" (also referred to as "national") is display advertising by national advertisers who promote their brand name products such as cars, cigarettes, and cosmetics on a nationwide basis. "Classified" includes locally placed ads which are listed together and organized by category such as real estate, employment opportunities, and auto sales. Classified and retail advertising constitute "local advertising".¹²⁵

77. Classified advertising is especially important to a newspaper because not only is it a source of revenue, but it also serves as an important stimulus to circulation. A strong classified advertising section attracts readers seeking employment, housing, automobiles and other goods or services. In addition, classified advertisers typically prefer to place their

¹²⁴See Finding 103.

¹²⁵NX A, p. 28, NX 100G ¶ 14 (Chapman), NX 700S ¶ 27 (Morton).

message in the newspaper that carries the most classified advertising.¹²⁶

78. A major News strength is in classified advertising as seen in Table 16.

79. Despite some gains in recent years¹²⁷, Free Press performance in classified advertising has been weak.¹²⁸ Miniscule improvement in Sunday share¹²⁹ would seem to be inevitable considering the large gap between the two papers and is probably attributable to the News's loss of circulation following the 1985 Sunday price increase.¹³⁰

80. The News has the lead in retail advertising. While the Free Press has shown fairly steady progress in Sunday lineage, daily gains have been sporadic as shown in Table 17.

81. National or "general" advertising accounts for only 10% of the News's and Free Press's advertising lineage. There is some indication that national advertisers may turn eventually to newspapers as an alternative to network television but no significant trend in this direction is yet discernible.¹³¹

82. The Free Press, reflecting its out-state circulation strength, has fared well in national advertising lineage as shown in Table 18 which indicates that its share of field has exceeded 50% for each year since 1976.

¹²⁶NX C-1, Appendix I, p. 17, NX 100G-H ¶ 15 (Chapman), NX 700T-U ¶ 29 (Morton). See also Lawrence 2935; IX 99D-E.

¹²⁷AX 504G, AX 505B-C; IX 233.

¹²⁸AX 515E.

¹²⁹IX 207A.

¹³⁰See IX 244.

¹³¹See Morton 2171.

Table 16
Combined Free Press and News Full-Run ROP Classified Linage (1960-1986)
and Free Press Share (%)

	DAILY		SUNDAY		TOTAL	
	COMBINED TOTAL	FREE PRESS SHARE (%)	COMBINED TOTAL	FREE PRESS SHARE (%)	COMBINED TOTAL	FREE PRESS SHARE (%)
1960	NA	NA	NA	NA	NA	NA
1961	NA	NA	NA	NA	NA	NA
1962	NA	NA	NA	NA		
NA	NA					
1963	NA	NA	NA	NA	NA	NA
1964	NA	NA	NA	NA	NA	NA
1965	NA	NA	NA	NA	NA	NA
1966	NA	NA	NA	NA	NA	NA
1967	NA	NA	NA	NA	NA	NA
1968	NA	NA	NA	NA	NA	NA
1969	NA	NA	NA	NA	NA	NA
1970	NA	NA	NA	NA	NA	NA
1971	11,838,080	33.0%	5,941,643	17.6%	17,779,723	27.9%
1972	13,022,783	33.6%	6,957,414	17.3%	19,980,197	27.9%
1973	14,975,227	33.2%	8,095,044	19.6%	23,070,271	28.4%

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1974	12,752,495	34.2%	7,835,738	22.6%	20,588,233	29.8%
1975	10,443,111	34.3%	7,316,634	22.3%	17,759,745	29.3%
1976	16,962,632	36.0%	8,464,852	23.8%	25,427,484	31.9%
1977	16,475,421	34.7%	9,171,942	20.1%	25,647,363	29.5%
1978	19,696,445	33.1%	11,058,843	20.8%	30,755,288	28.7%
1979	19,842,488	31.9%	11,667,391	22.5%	31,509,879	28.5%
1980	16,445,477	30.6%	10,071,183	22.8%	26,516,660	27.6%
1981	16,299,056	33.6%	9,302,953	26.4%	25,602,009	31.0%
1982	14,522,681	32.6%	7,662,141	26.7%	22,184,822	30.5%
1983	15,560,265	32.6%	8,494,956	24.8%	24,055,221	29.8%
1984	18,306,796	32.9%	10,911,298	25.1%	29,218,094	30.0%
1985	21,845,159	33.9%	13,062,966	27.9%	34,908,125	31.7%
1986	25,760,480	31.2%	14,140,926	29.7%	39,901,406	30.7%

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Notes: 1960-1974 in 8-column format, 1975-1986 in 9-column format. Automotive, financial and legal advertising lineage has been allocated to retail, general and classified categories, following the method shown in the applicant's NX 617 C-F.

Source: JX 17.

e. Financial Condition of the Free Press

83. Prior to 1980, the Free Press was a profitable paper.¹³² Between 1980 and 1986, the Free Press had operating losses of \$56.2 million including the Michigan Single Business Tax and excluding management fees as shown in Table 19.¹³³

84. The Michigan Single Business Tax (MSBT), which is shown in the sixth column of Table 19, is an annual franchise fee which is properly included as an operating expense.¹³⁴

85. On the question of management fees, the Free Press, like other Knight-Ridder newspapers, is from time to time charged a management fee for home office overhead as well as an array of administrative, personnel, computer, communications, accounting, counseling, support, and legal services.¹³⁵ Prior to 1982, the management fee was based on a percentage of the newspaper's profit. Accordingly, the Free Press was not charged a management fee in either 1980 or 1981 because it did not earn a profit in those years. No fee was paid in 1979 although the Free Press earned a small operating profit then. A charge was made in 1978 and the preceding years when the Free Press was profitable. In June 1985, Knight-Ridder determined not to charge management fees for 1984 and 1985, and the Free Press was told to adjust

¹³²The 1968 losses were attributable to a year-long strike. Chapman 1766; AX 515A. The question of the level and disposition of profits for the years 1940-1979 as between Knight-Ridder and the Free Press was not the subject of pre-hearing discovery, nor was this point developed on the record in any meaningful way. See, e.g., Thibault 343-44, 359, 435-36, IX 385A.

¹³³The Free Press's current operating budget anticipates the same operating loss for 1987 as for 1986. See Chapman 1964-65; NX 206A.

¹³⁴NX C-1, Appendix I, p. 40, NX 500L-M ¶ 36-37 (Thibault), NX 600J-L ¶ 32 (Kahn).

¹³⁵NX C-1, Appendix I, p. 47, NX 500M-P ¶¶ 39-46 (Thibault).

its books retroactively to reflect this change. In September 1985, however, this decision was reversed and an estimated management fee was assessed for these two years. But a still different (and lower) figure was pressed in this proceeding on the basis of an accounting device (the so-called three-part test) which KnightRidder and the Free Press had not used for internal purposes.¹³⁶

86. While the services provided for the management fees have value, and the Free Press would undoubtedly have to pay for at least some of these services if it were a stand-alone firm, Applicants did not quantify how much of the management fees represents actual value received by the Free Press or which of these fees the Free Press would have had to incur on a stand-alone basis.¹³⁷ A more stringent accounting of management fees is required given the record evidence that this charge contains a substantial degree of discretion. To illustrate, Gannett charges its newspapers no management fees at all since Neuharth views these services as representative of corporate strength which are more likely to be used (and thereby improve Gannett corporate performance) if they are made available at the discretion of the local paper and without charge.¹³⁸ Moreover, the Free Press's and Knight-Ridder's handling of management fees smacks of slippery accounting which cautions even further against their use: Knight-Ridder's internal accounting system does not report management fees as operating expenses; Knight-Ridder does not take management fees into account in assessing newspaper performance;

¹³⁶Hall 1003-05, 1014, 1069-74; NX C-1, Appendix I, pp. 47-48, NX 6''0'', NX 500''O'' ¶ 44 (Thibault); AX 404A-B; IX 346A-B.

¹³⁷Thibault 279-81. See also Hall 1004-05.

¹³⁸Neuharth 1584-88.

Table 17
Combined Free Press and News Full-Run ROP Retail Linage (1960-1986)
and Free Press Share (%)

	DAILY			SUNDAY			TOTAL	
	COMBINED TOTAL	FREE PRESS SHARE (%)	COMBINED TOTAL	FREE PRESS SHARE (%)	COMBINED TOTAL	FREE PRESS SHARE (%)	COMBINED TOTAL	FREE PRESS SHARE (%)
1960	NA	NA	NA	NA	NA	NA	NA	NA
1961	NA	NA	NA	NA	NA	NA	NA	NA
1962	NA	NA	NA	NA	NA	NA	NA	NA
1963	NA	NA	NA	NA	NA	NA	NA	NA
1964	NA	NA	NA	NA	NA	NA	NA	NA
1965	NA	NA	NA	NA	NA	NA	NA	NA
1966	NA	NA	NA	NA	NA	NA	NA	NA
1967	NA	NA	NA	NA	NA	NA	NA	NA
1968	NA	NA	NA	NA	NA	NA	NA	NA
1969	NA	NA	NA	NA	NA	NA	NA	NA
1970	NA	NA	NA	NA	NA	NA	NA	NA
1971	30,140,955	36.0%	10,293,488	32.3%	40,434,443	35.1%		
1972	32,608,486	38.0%	10,618,241	31.3%	43,226,728	36.4%		
1973	33,976,458	39.7%	10,674,552	33.6%	44,651,010	38.3%		
1974	33,721,185	40.4%	10,800,845	36.8%	44,522,030	39.5%		

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1975	37,885,714	42.4%	11,506,992	35.2%	49,392,705	40.7%
1976	38,435,146	45.5%	11,721,961	36.0%	50,157,107	43.3%
1977	39,791,289	45.8%	12,822,631	35.6%	52,613,920	43.3%
1978	41,160,918	47.0%	13,558,179	37.4%	54,719,098	44.6%
1979	39,185,228	48.2%	12,736,297	39.1%	51,921,525	46.0%
1980	36,495,063	45.9%	11,623,094	39.8%	48,118,157	44.4%
1981	34,239,244	45.6%	11,376,827	36.3%	45,616,071	43.3%
1982	29,777,030	47.4%	9,713,412	38.3%	39,490,443	45.2%
1983	29,187,367	47.5%	10,616,432	39.4%	39,803,798	45.3%
1984	27,816,949	48.2%	9,652,445	39.0%	37,469,394	45.9%
1985	28,916,567	43.8%	9,892,347	39.3%	38,808,914	42.6%
1986	29,859,666	44.3%	10,000,330	41.3%	39,859,997	43.6%

73a

Note: 1960-1974 in 8-column format, 1975-1986 in 9-column. Automotive, financial and legal advertising lineage has been allocated to retail, general and classified categories, following the method shown in the applicant's NX 617 C-F.

Source: JX 13.

Table 18
Combined Free Press and News Full-Run ROP General Linage (1960-1986)
and Free Press Share (%)

	DAILY			SUNDAY			TOTAL		
	COMBINED TOTAL	FREE PRESS SHARE (%)	COMBINED TOTAL	FREE PRESS SHARE (%)	COMBINED TOTAL	FREE PRESS SHARE (%)	COMBINED TOTAL	FREE PRESS SHARE (%)	
1960	NA	NA	NA	NA	NA	NA	NA	NA	NA
1961	NA	NA	NA	NA	NA	NA	NA	NA	NA
1962	NA	NA	NA	NA	NA	NA	NA	NA	NA
1963	NA	NA	NA	NA	NA	NA	NA	NA	NA
1964	NA	NA	NA	NA	NA	NA	NA	NA	NA
1965	NA	NA	NA	NA	NA	NA	NA	NA	NA
1966	NA	NA	NA	NA	NA	NA	NA	NA	NA
1967	NA	NA	NA	NA	NA	NA	NA	NA	NA
1968	NA	NA	NA	NA	NA	NA	NA	NA	NA
1969	NA	NA	NA	NA	NA	NA	NA	NA	NA
1970	NA	NA	NA	NA	NA	NA	NA	NA	NA
1971	6,381,468	45.6%	1,464,899			41.3%	7,846,367		44.8%
1972	6,833,755	47.5%	1,870,764			42.7%	8,704,518		46.4%
1973	6,747,791	47.1%	2,101,395			43.4%	8,849,186		46.2%
1974	6,951,849	48.8%	2,088,378			46.6%	9,040,227		48.3%

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1975	7,074,394	47.2%	2,031,420			41.2%	9,105,814		45.8%
1976	7,443,642	52.3%	2,324,709			45.1%	9,768,351		50.6%
1977	7,553,629	52.3%	2,365,272			43.6%	9,918,901		50.2%
1978	6,760,071	52.6%	2,367,459			47.3%	9,127,530		51.2%
1979	6,993,788	53.4%	2,472,310			48.1%	9,466,099		52.0%
1980	6,648,565	51.6%	2,105,807			48.9%	8,754,372		50.9%
1981	6,455,243	51.7%	2,144,849			45.2%	8,600,092		50.1%
1982	6,447,805	52.2%	1,957,712			48.0%	8,405,516		51.2%
1983	5,851,422	56.5%	2,213,044			50.0%	8,064,467		54.7%
1984	6,536,053	55.1%	2,534,815			47.8%	9,070,868		53.1%
1985	7,355,297	50.6%	3,071,009			52.9%	10,426,306		51.2%
1986	6,529,275	53.1%	3,017,088			52.6%	9,546,363		52.9%

75a

Notes: 1960-1974 in 8-column format, 1975-1986 in 9-column format. Automotive, financial and legal advertising lineage has been allocated to retail, general and classified categories, following the method shown in the applicant's NX 617 C-F.

Source: JX 16.

Table 19
Free Press Selected Financial Information (1963-1986)
(in thousands of dollars)

	Total Oper. Rev.	Total Oper. Exp.	Total Oper. Profit or (Loss)	Mgmt. Fee	Mich. Single Bus. Tax (MSBT) (3)	Revised Total (4)
1963	\$32,561	\$30,390	\$2,171	NA	NA	NA
1964	\$22,108	\$21,508	\$600	NA	NA	NA
1965	\$36,476	\$32,720	\$3,756	NA	NA	NA
1966	\$40,170	\$35,896	\$4,274	NA	NA	NA
1967	\$36,605	\$34,966	\$1,639	NA	NA	NA
1968	\$18,106	\$19,344	(\$1,238)	NA	NA	NA
1969	\$47,010	\$41,858	\$5,152	NA	NA	NA
1970	\$47,443	\$43,716	\$3,727	\$335	NA	NA
1971	\$53,889	\$47,989	\$5,900	\$338	NA	NA
1972	\$60,460	\$55,669	\$4,791	\$490	NA	NA
1973	\$66,639	\$62,420	\$4,219	\$961	NA	NA
1974	\$73,727	\$70,287	\$3,440	\$1,239	NA	NA
1975	\$78,542	\$75,800	\$2,742	\$1,076	NA	NA
1976	\$90,784	\$83,884	\$6,900	\$1,068	\$822	8,790

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1977	\$99,075	\$91,553	\$7,522	\$1,227	\$599	9,348
1978	\$106,963	\$102,609	\$4,354	\$1,498	\$521	6,373
1979	\$114,839	\$116,532	(\$1,693)	\$1,773	\$607	687
1980	\$116,095	\$123,459	(\$7,364)	\$2,084	\$658	(\$4,593)
1981	\$125,396	\$136,062	(\$10,666)	\$2,119	\$762	(\$7,785)
1982	\$127,767	\$138,666	(\$10,899)	\$2,315	\$755	(\$7,829)
1983	\$137,058	\$147,680	(\$10,622)	\$2,810	\$807	(\$7,005)
1984	\$147,231	\$159,024	(\$11,793)	\$2,749	\$898	(\$8,146)
1985	\$160,017	\$172,569	(\$12,552)	\$3,327	\$845	(\$8,380)
1986	\$168,310	\$185,281	(\$16,971)	\$3,723	\$717	(\$12,531)

Notes:

1. Data for 1963-1975 are not necessarily consistent nor comparable from year to year or between the Free Press and the Detroit News (see Table 22) due to possible classification or accounting policy differences or changes.
2. Data for 1963-1975 may include operations of business other than the Free Press.
3. No MSBT before 1976.
4. Revised total equals total operating profit (loss) minus management fee plus MSBT.

Source: JX 15.

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as indicated in Finding 85 a decision to reverse a previous forgiveness of management fees came about when the JOA application was clearly part of the picture; and while the management fee which eventually was put forward in this proceeding was lower than previous estimates, it was derived from a methodology which was not even used internally prior to the filing of the JOA.¹³⁹

87. Another challenge to the Free Press's accounting came from John Kwoka, an economist retained by the Antitrust Division, who claimed that the expenses incurred for the purpose of improving the Free Press's long-term competitive position (namely, the above-average expenditures of the Tiger plan for 1984-86 which Kwoka's regression analysis put at \$10.3 million¹⁴⁰) are properly treated as capital expenses (and depreciated at an annual rate of 60% for purposes of a JOA analysis.¹⁴¹ While Kwoka's approach finds some support in Applicants' own perceptions of the significance of huge expenditures in the Detroit newspaper war — they are considered "investments" to be returned in future profits¹⁴² — the adjustments he advocated would not only be an extreme departure from any accepted accounting norm for evaluating current operations, but they would only have the effect of reduc-

¹³⁹Hall 1070-74, 1284-88, Chapman 1949-50. It should also be noted that in reporting management fees as part of the JOA process, they have been moved from below the line (a non-operating expense) on the application filed with the Attorney General to above the line (an operating expense) in post-application exhibits. Hall 1017-18.

¹⁴⁰Kwoka 3071; AX 200S-T ¶¶ 38-39 (Kwoka).

¹⁴¹Kwoka 3055-56, 3134; Ax 200A to Z5 ¶¶ 1-60 (Kwoka).

¹⁴²Kwoka's analysis also finds additional support in the notion that circulation obtained through a corporate acquisition (as in the case of the News's acquisition of the *Detroit Times*) is amortized in contrast to circulation "acquired" by promotional efforts. Thibault 317-18, Kahn 727-31.

ing later period profits or increasing later period losses.¹⁴³ Besides, Kwoka's analysis adds little to the record since even with the amortization of the Tiger expenses, Free Press operating losses are nevertheless substantial.¹⁴⁴

88. Questions have also been raised by the Antitrust Division and Intervenor about the reliability for purposes of failing newspaper analysis of the Free Press's non-operating expenses¹⁴⁵ and its balance sheet.¹⁴⁶ These questions relate mainly to the treatment of loans and advances from Knight-Ridder as well as the way that the Free Press's tax loss carryover was handled.¹⁴⁷

89. In connection with the construction of the Riverfront Plant, Knight-Ridder loaned \$41 million to the Free Press. The loan was evidenced by an interest-bearing promissory note. Additional advances increased the principal amount of the loan to \$71 million.¹⁴⁸ In 1985, Knight-Ridder capitalized the \$71 million by removing that amount from the Free Press's long term liability account and adding it to the Free Press's

¹⁴³Thibault 519-24, Kahn 886-87; Kwoka 3112-13, 3140; AX 200C ¶ 7 (Kwoka).

¹⁴⁴AX 200Z-2 to Z-6 ¶¶ 54-62 (Kwoka).

¹⁴⁵When non-operating items (mainly interest expense) are added, the losses of the Free Press for the years 1979-1986 amounted to over \$130 million. NX 603A. See, however, Finding 89 for the handling of interest expense.

¹⁴⁶As of December 31, 1981, the balance sheet of the Free Press reflected a negative shareholder's equity of \$106 million. NX 502E, NX 600'O' ¶ 39 (Kahn), NX 603B.

¹⁴⁷On the question of the amortization of the Riverfront Plant expansion, the Antitrust Division's retained expert, John Kwoka, concluded that the period chosen — 25 years — was "appropriately conservative straight-line depreciation". AX 200Z-1 ¶ 52 (Kwoka). See also NX 6P-S, NX 100Z-35 ¶ 125 (Chapman), NX 200U-V ¶ 46 (Hall), NX 500P-Q ¶¶ 48-49 (Thibault), NX 600M-N ¶ 35 (Kahn).

¹⁴⁸Hall 1122; NX 502N, NX 827A-C.

paid-in capital account with the result that the equity picture of the Free Press was dramatically improved.¹⁴⁹ Knight-Ridder's purpose was to conceal from the News the size of the Free Press's operating losses which could be gauged from the Free Press's rapidly decreasing equity as shown in papers filed with the State of Michigan.¹⁵⁰ In December 1986, "in light of the JOA application", the transaction was reversed¹⁵¹, the loan was again shown as a liability on the balance sheet, and the previously forgiven accrued interest expenses were restored.¹⁵²

90. The tax issue revolves around the treatment of the tax loss carryover. The losses of the Free Press from 1979 to date would have enabled the paper for tax purposes to carry those losses back for three years and to carry them forward as an offset against net profits for 15 years.¹⁵³ The Free Press's financial statements specifically prepared for this litigation do not reflect the potential tax benefit of carrying forward the losses because the Knight-ridder accountant believes that it is improper to reflect the value of a future offset against profits unless the realization of profits is assured beyond a reasonable doubt.¹⁵⁴ The same accounting firm, however, was not nearly as inflexible when it came to preparing pre-litigation internal financial statements. For that purpose, the tax car-

¹⁴⁹Thibault 270-72, 361; NX 502N. At the same time the accrued interest charges (\$26.4 million) were eliminated retroactive to January 1, 1984. Thibault 361-62, 371-75.

¹⁵⁰Thibault 476; AX 405C; see also IX 106E.

¹⁵¹IX 384F. See also Thibault 379.

¹⁵²Thibault 382-83; NX C-1, Appendix I, pp. 49-50; AX 405A-C; IX 383A-C.

¹⁵³Thibault 421.

¹⁵⁴Thibault 417-18, 421, 502-05; NX 828F.

ryover was shown as a reduction in Free Press net losses.¹⁵⁵ Even if this bookkeeping discrepancy had been satisfactorily resolved on the record, which it was not, it would have no impact whatsoever on the operating losses reported in Table 19.

91. To sum up. The flip flops described in Findings 85-86 and 89-90, suggest that the discretionary aspect of the parent-subsidiary relationship lends itself to creative bookkeeping which tends to make the Free Press's balance sheet and P&L suspect.¹⁵⁶ But this cautionary note aside, there can be no

¹⁵⁵Thibault 404-05, 418-19; IX 374B, IX 389L. The same treatment of tax losses appeared in the original JOA application. Thibault 399. There is a related question of whether the tax benefit to Knight-Ridder from Free Press losses is properly carried on the Free Press's balance sheet as an asset or on its P&L as an offset against net losses. Applicant's argument that this may only be done if there is a formal tax-sharing agreement between parent and subsidiary is flimsy (a written agreement is not required and may be inferred, see Thibault 397-98, NX 500J-K ¶ 27 (Thibault)); but given the requirement under NPA that the Free Press should be considered as a stand-alone entity, resolution of this arcane point of federal tax — i.e., when tax benefits may be transferred between parent and subsidiary — is not required. It is fair to assume, of course, that any unused Free Press tax loss carryovers (should they exist) may be taken into an account by any interested acquirer of the Free Press as an offset against future profits. Thibault 422. The record evidence, however, on the question of potential acquisition is so insubstantial that it is unnecessary to speculate about the significance which a potential acquirer would attach to this nebulous asset which, in any event, may already have been used up by Knight-Ridder. See Finding 123 and Thibault 508, 534.

¹⁵⁶To illustrate, the equity-debt reversal described in Finding 89 caused the Free Press balance sheet to show a deficit equity as of December 31, 1986, of \$105,735,000. Had the reversal not taken place, the deficit would have been \$8,393,217 — i.e., \$105,735,000 less the capital contribution of \$70,922,873 and the accrued interest for 1984-86 of \$26,419,000. Moreover, without the reversal, the Free Press's net losses (but not operating losses) would also have been substantially lower because of the elimination of interest expense. Thibault 340, 361-62, 372-75; NX 502E, F, N; IX 383A-C. The use of this sort of discretionary manipulation substantially reduces the reliability of ratios and analyses based on balance sheets and net losses rather than operating losses alone. See, e.g., Thibault 277, 339, Kahn 666, 788, 794-76.

serious question that between 1979-1986 the Free Press had deep operating losses, that it did not generate an adequate cash flow to cover actual operating expenses¹⁵⁵, that given its poor financial performance it was unlikely to find funding elsewhere¹⁵⁸, and that without advances from Knight-Ridder (or some other parent) it could not continue as a going concern on a stand-alone basis.¹⁵⁹ On the other hand, its poor financial performance must be evaluated in the context of a deliberate Knight-Ridder strategy of striving for future market dominance and profitability (or a JOA) at the expense of present profits.

f. Financial Condition of the News

92. The News's financial performance between 1980-1986, as seen in Table 20, was hardly more impressive than the Free Press's.

93. The News had an operating profit in 1985 of \$667,000. This was attributed by News executives to a diversion of management's attention away from the competitive struggle while ENA's stock was "in play" and also to the requirement in the contract of sale to Gannett that certain minimal financial goals be met.¹⁶¹ The record tends to support this odd ex-

¹⁵⁷See Table 19.

¹⁵⁸Thibault 264, 336, 472, 496-97, Kahn 876-79.

¹⁵⁹Thibault 263-64, 284, 392, 472-73; NX 500G, X ¶¶ 19-20, 66 (Thibault), NX 600R-T ¶¶ 48-51 (Kahn).

¹⁶⁰Thibault 307-08, 310-11, 332-34, 495-96, 529-31, 532-33, 550-51, 553; IX 377A. See also Kahn 654, 676, 722-24, 783-84, 900-01, Chapman 2140-43.

¹⁶¹Clark 1357-58; 1360-66; NX 300''O'' ¶ 37 (Neuharth), NX 400 S-T ¶¶ 41-45 (Clark). The 1985 profit may also reflect in part an ENA decision to drop management fees and the Michigan Single Business Tax from News operating charges. IX 269A-B.

planation for a firm's profitability, witness the fact that the advent of Gannett and the return of the News to the fray has produced record losses.¹⁶²

94. Not only will the News's losses in 1987 approximate those of 1986, but there is no end in sight for such losses so long as Gannett and Knight-Ridder persist in maintaining present pricing policies¹⁶³ and do not move to higher prices.¹⁶⁴ The financial condition of the Free Press, summarized in Finding 91, (that is, without funding from its parent, its future as a viable stand-alone entity is in doubt so long as present conditions persist) applies with near equal force to the News.¹⁶⁵ Despite its sharp losses, News management never considered shutting the paper down.¹⁶⁶

95. In Neuharth's view the News's losses represent an investment which will pay off in future profits either in the form of market domination or a JOA. This is Neuharth's "win/win" strategy.¹⁶⁷

¹⁶²Clark 1455-57, Neuharth 1570-72, 1578-79; NX 300J-K ¶¶ 26-28, (Neuharth), NX 400U ¶ 46 (Clark).

¹⁶³Clark 1455-56, Neuharth 1539, 1623-24, 1714-15; NX 100Z-40 ¶ 135 (Chapman).

¹⁶⁴News, ENA, and Gannett officials believed that circulation and advertising rate increases (presumably increases followed by the Free Press) would return the News to profitability. Clark 1418-22, Neuharth 1722-23; AX 558A, E, AX 559A, AX 560A. See also Finding 113.

¹⁶⁵See AX 584 and Neuharth 1624.

¹⁶⁶Clark 1387-89.

¹⁶⁷Neuharth 1617-18, 1625-27, NX 300L-M ¶ 31-33 (Neuharth). See Neuharth 1681-85 for a similar "investment" rationale for the \$400 million pre-tax loss thus far incurred by Gannett's *USA Today*.

Table 20
News Selected Financial Information (1963-1986)
(in thousands of dollars)

	Total Oper. Rev.	Total Oper. Exp.	Total Oper. Profit or (Loss)	Mgmt. Fee	Mich. Single Bus. Tax (MSBT) (3)	Revised Total (4)
1963	\$65,904	\$57,220	\$8,684	NA	NA	NA
1964	\$46,700	\$44,506	\$2,194	NA	NA	NA
1965	\$75,825	\$62,770	\$13,055	NA	NA	NA
1966	\$81,568	\$68,164	\$13,404	NA	NA	NA
1967	\$71,436	\$64,864	\$6,572	NA	NA	NA
1968	\$32,906	\$35,677	(\$2,771)	NA	NA	NA
1969	\$85,529	\$73,057	\$12,472	NA	NA	NA
1970	\$87,978	\$78,480	\$9,498	NA	NA	NA
1971	\$93,620	\$84,380	\$9,240	NA	NA	NA
1972	\$104,347	\$93,724	\$10,623	NA	NA	NA
1973	\$111,339	\$107,452	\$3,887	NA	NA	NA
1974	\$113,915	\$108,465	\$5,450	NA	NA	NA
1975	\$117,331	\$108,601	\$8,730	NA	NA	NA
1976	\$129,928	\$120,280	\$9,648	\$1,584	\$1,706	\$12,938

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1977	\$141,213	\$128,576	\$12,637	\$1,374	\$1,509	\$15,530
1978	\$155,574	\$143,866	\$11,708	\$1,786	\$1,551	\$15,045
1979	\$164,028	\$151,996	\$12,032	\$1,989	\$1,654	\$15,675
1980	\$160,930	\$161,210	(\$280)	\$2,288	\$1,154	\$3,162
1981	\$171,865	\$180,094	(\$8,229)	\$2,616	\$1,455	(\$4,158)
1982	\$164,380	\$178,060	(\$13,680)	\$2,811	\$1,415	(\$9,454)
1983	\$172,866	\$184,373	(\$11,508)	\$2,817	\$1,407	(\$7,284)
1984	\$192,426	\$200,733	(\$8,307)	\$2,931	\$1,765	(\$3,611)
1985	\$218,053	\$222,439	(\$4,386)	\$3,291	\$1,762	\$667
1986	\$229,630	\$242,864	(\$13,234)	\$573	\$0	(\$12,661)

Notes:

1. Data for 1963-1975 are not necessarily consistent nor comparable from year to year or between the Free Press and the Detroit News (see Table 21) due to possible classification or accounting policy differences or changes.

2. No MSBT before 1976.

3. Revised total equals total operating profit (loss) minus management fee plus MSBT.

Source: JX 5.

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B. The Prospects For The Free Press

96. The Attorney General directed that a record be made respecting several alternative scenarios — an economic upturn in the Detroit market, price increases, cost savings, market segmentation — which could conceivably return the Free Press to profitability. The prospects for each of these conditions are considered in Findings 97 to 121.

1. The Detroit Economy

97. The record presents a mixed picture of how far Detroit has progressed from the depths of the deep recession of 1979-1984. By the end of 1984, total employment in the Detroit metropolitan area had rebounded nearly 6% from its low point in 1983 and stood at 93.2% of its level in 1979.¹⁶⁸ In 1986, however, there were still additional setbacks in the auto industry.¹⁶⁹

98. As for predicting the long-range prospects of Detroit, the record on this point (consisting of whatever gloomy or sanguine statistical scrap either side could dredge up but all unaccompanied by any persuasive expert opinion compelling a choice in either direction¹⁷⁰) does little to resolve reservations about even attempting to litigate over this sort of guesswork. What the record clearly does show, however, is that even under the most modest assumptions about the future of the area, the huge Detroit newspaper market (valued at over \$300 million) is a choice plum. As Free Press planners put it —

¹⁶⁸NX 870A-H. See also 1X 165A.

¹⁶⁹NX 100Z-11 ¶ 75 (Chapman), NX 400J ¶ 21 (Clark), NX 700Z-10 to Z-11 ¶ 59 (Morton).

¹⁷⁰Compare IX 211C-D, IX 400C, E-F ¶¶ 4, 7 (Young), IX 404AB, IX 405C-P ¶ 4-29 (Johnson), IX 406A-G, IX 407, IX 408A to Z13, IX 409A-P, IX 519A to Z-3, with Rosse 2492-96, NX 3A-B, K, NX 700Z-10 to Z-13 = ¶ 59-63 (Morton), NX 800Z-29 to Z-30 ¶ 94 (Rosse), NX 868A-B, NX 872A to Z-12.

THE DETROIT MARKET

Detroit, the nation's fifth largest market, has already grown to where many of the so-called "growth markets" want to be.

For instance:

Population	5th	4.3 million
Households	5th	1.6 million
Effective buying income	5th	\$46 billion
Total retail sales	4th	\$22.8 billion

The suburban Detroit market, with three million residents, is second only to Los Angeles in population. The effective buying power of suburban Detroit is fourth in the nation at \$35 billion.¹⁷¹

2. Increased Revenue

99. Apparently confident that the opening of the Riverfront Plant would soon give it the circulation lead (and with the objective of recouping in part the capital outlay for the project) the daily price of the Free Press was increased from 15¢ to 20¢ in 1979. To this day, the News has not followed this price increase because it fears loss of the circulation lead if the papers

¹⁷¹AX A, p. K 001791. See also AX 570Z-3 ("the market represents one of the most promising long turn newspaper 'turfs' available"), and AX 503B-D, AX 504C, IX 22D-E, IX 51C, IX 96D, IX 161H, IX 255A-B. Only one larger metropolitan area (Philadelphia) does not now have two competing newspapers, and several markets smaller than Detroit support newspaper competition. AX 1A, AX 2E. The evaluation cited in the text of this finding followed an assumption "That the economic climate will remain about the same. Though some short-term fluctuation will occur, in the longer term we anticipate that while the decline probably has bottomed out, we likely won't see any significant growth in the marketplace for the foreseeable future." AX A, p. K 001793.

sold at the same price.¹⁷² Other significant price moves were as follows:

In 1983 the News raised its out-state price to 20¢, matching the Free Press's out-state price.¹⁷³

The prospect of increasing losses from Tiger II, apparently inspired a January 6, 1985, Sunday price increase by the Free Press from 50¢ to 75¢. The News followed on April 7, 1985.¹⁷⁴

On March 31, 1986, the News reduced its daily out-state price from 20¢ to 15¢. The Free Press followed the News's lead on the same date.¹⁷⁵

On May 18, 1987, the News raised the daily copy price in the out-state area to 20¢. The Free Press followed this lead on the same day.¹⁷⁶ This increase alone was projected by the

¹⁷²Clark 1382, 1385, 1504-05, Nelson 3384-87; NX 400G ¶ 14 (Clark), NX 852F; IX 35C, IX 139A. The Free Press's weekly subscription price in the CZ and RTZ is \$1.90 compared to the News's \$1.65. Clark 1382-83; NX 6A, NX 200Z-10 ¶ 74 (Hall), NX 800Z-48 ¶ 137 (Rosse); AX 9A; IX 139A.

¹⁷³Clark 1353.

¹⁷⁴NX C-2, Exhs. 9.a, 9.b, NX 400Z-3 ¶ 62 (Clark). There is evidence that the Sunday price increase had a tactical component too. By increasing its Sunday price the Free Press wished "to force the which-paper-to-buy Sunday issue (based on the assumption fewer people will buy two Sundays if the price goes to \$1.75)." IX 314A. This Sunday price increase was projected by the Free Press to produce additional revenue of \$5,570,321 (IX 88B) and while it added revenue to the Free Press's bottom line (Lawrence 2939), the drop in overall Sunday circulation of both papers following the increase reduced the gain in income below the projected amount. NX A, p. 62; IX 150C, Q, IX 258, IX 302A. See also Chapman 1954, IX 155A. It should also be noted that any increase in circulation prices is only partially credited to the newspaper because some of the added revenue must be passed on to distributors. Hall 1261; IX 46.

¹⁷⁵NX 200, Z-13 ¶ 81 (Hall); AX 503P, AX 555.

¹⁷⁶Lawrence 2880; NX 200N ¶ 31 (Hall).

Free Press to reduce its operating loss by over \$543,000 for the balance of 1987.¹⁷⁷

100. The daily prices in Detroit (20¢ for the News and 15¢ for the Free Press) are probably the lowest in the United States.¹⁷⁸

101. In addition to low cover prices, both papers have discounted sharply to promote circulation. The News despite its cover price advantage has used discounting more aggressively in order to maintain its circulation lead.¹⁷⁹

102. While Free Press management has expressed the belief that it "can endure and regain more quickly from pricing [increases] than the News"¹⁸⁰ (and there is some support in the record for this view since the Free Press has largely maintained its nearly equal total daily circulation notwithstanding its higher price¹⁸¹) the Antitrust Division and Intervenor did not seriously challenge the evidence showing that future profitability could not be accomplished by any additional circula-

¹⁷⁷AX 554. See also NX 200Z-13 to Z-14 ¶ 81 (Hall).

¹⁷⁸Neuharth 1687-88, Chapman 1957; AX 2A-E, AX 3A-B, AX 515B, AX 572C; IX 173C, IX 255Q, IX 461A-B. The 75¢ charge for the Sunday papers is also among the nation's lowest Sunday prices. AX 579D.

¹⁷⁹Hall 1164-66, Clark 1383-84, 1395, 1436, 1465-66 Morton 2241-42, Rosse 2453-54; NX 400Z-2 ¶ 60 (Clark), NX 852G; AX 503G, AX 515B, AX 529B-C, AX 564B-C, AX 581C; IX 52B, IX 96B, IX 214A, IX 221, IX 272A-D, IX 312F, IX 342B, IX 355. Interestingly, it is the paper which is faced with the prospect of entering the "downward spiral" (see Finding 128) which traditionally has been the heaviest discounter. Morton 2245, Rosse 2455. Circulation discounting is generally frowned upon by advertisers who feel that it only produces casual readers. Rosse 2455. See also AX 504N, O.

¹⁸⁰AX 503H; see also IX 189, IX 212C, IX 258.

¹⁸¹See, e.g., Morton 2273, Lawrence 2850; AX 505A-G; IX 212A, IX 272A. Free Press sponsored market research, however, indicates that actual price sensitivity for both papers is about the same. IX 198Z-15.

tion price increases by either the Free Press or the News which is not followed by the other.¹⁸²

103. Prior to the Gannett acquisition, the Free Press and Knight-Ridder had little basis for expecting that ENA would oblige the Free Press by either following or initiating any additional circulation price increases.¹⁸³ While a daily price increase was briefly considered by the News in 1985 following the Sunday increase¹⁸⁴, the Sunday price increase itself was regarded as a mistake by News's management since it may have had the effect of diminishing the News's lead (in both daily and Sunday circulation) and thus was contrary to the News's overall strategy of seeking domination through low circulation and advertising prices.¹⁸⁵

¹⁸²While the record does not establish the precise demand elasticities of the Detroit newspaper market, it is clear that any additional unilateral price increases by either paper would mean the loss of some circulation which in turn may require still additional promotional expenses including perhaps discounts off the increased circulation price. A loss of circulation may in return require a reduction in advertising prices because of the effect on milline rates. Hall 1261, 1265, Clark 1385, 1433-34, Chapman 1868-89, 1958-59, 1962-63, Rosse 2617, 2699-2700, Morton 2355-57, Lawrence 3024-26, Simon 3240-41, 3243-44, Nelson 3382-84; NX 100Z-43 to Z-46 ¶¶ 141, 143-48 (Chapman), NX 200Z-10 to Z13 ¶¶ 75-79, 81 (Hall), NX 700Z-37 to Z-39 ¶¶ 102-105 (Morton), NX 800Z-51 to Z-53, ¶¶ 144, 146 (Rosse); IX 79A, IX 96D, IX 88B, IX 99Z-33. Of course the best proof of the lack of Free Press pricing flexibility is shown by its inability in the face of substantial losses to increase daily prices because of apprehension over the adverse circulation effect. See, e.g., IX 92A-B.

¹⁸³Clark 1425-26, Nelson 3368, 3373, 3382-87, 3391; AX 501H, AX 515B-C, AX 556. It is virtually certain that the Free Press would have followed any News price increase. Hall 1315; AX 504U.

¹⁸⁴AX 557A-M; IX 162W.

¹⁸⁵Clark 1353-54, 1385, 1394-96, 1436, 1458-63, 1504-05, 1511-13, Nelson 3401, 3403-05; NX 400Z-3 ¶ 63 (Clark); IX 96B, IX 155A-D.

104. Free Press and Knight-Ridder management had good reason to anticipate a more accommodating pricing policy from Gannett given Gannett's well-recognized reputation for charging at least 25¢ and in many cases 35¢ for its papers¹⁸⁶. Moreover, Neuharth had predicted that total readership of the two Detroit papers would continue to increase "even if, or maybe especially if, they make it more convenient for the public to drop a single coin like a quarter into a vending machine rather than two dimes or a nickel and a dime."¹⁸⁷

105. Notwithstanding Free Press expectations and Neuharth's intimations of a price increase, Gannett's first action in arriving in Detroit was to lower its price out-state (where the Free Press is dominant) from 20¢ to 15¢. This shot across the bow impressed on Knight-Ridder the high cost of head-to-head competition with Gannett and the desirability of a JOA.¹⁸⁸

106. Gannett pricing strategy was also motivated by the realization that any increase in circulation price might jeopardize the JOA by putting the Free Press into the black.¹⁸⁹

¹⁸⁶Hall 1030-31, Neuharth 1689-90, Morton 2182, 2184-85, 2327-29, 2343-44, Lawrence 2875, 3014-15; AX 503N-"O", AX 504F, U-X, AX 505A-B, AX 553A, AX 572C, AX 581A-D; IX 173C, IX 197A. See also Chapman 1959, 2006-07.

¹⁸⁷IX 572D. Neuharth told the Detroit Press club that underpricing their newspapers is one of the biggest mistakes made by publishers. AX 572C-D. See also IX 165B.

¹⁸⁸Neuharth 1524-25, 1712-13, Chapman 1902-03; AX 503N-P; IX 241, IX 345A.

¹⁸⁹IX 167A, IX 235B. As early as August 1985, Gannett officials were sensitive to the effect on JOA prospects of any price increase which could return the Free Press to profitability. Gannett was also concerned that any pause in News discounting could move the Free Press into the circulation lead. Neuharth 1687; IX 167A.

107. Neuharth and other Gannett officials testified that without a JOA they will not raise circulation prices since they intend to maintain pressure on the Free Press as they seek market domination.¹⁹⁰ This strategy received the endorsement of Applicants' retained expert.¹⁹¹ But Gannett officials and retained expert never explained how Gannett can persist in this strategy in the face of uncontroverted proof that neither the News nor the Free Press can become profitable so long as both papers continue current competitive strategies.¹⁹² As it happens, contemporaneous evidence indicates that absent a JOA Gannett may eventually initiate circulation price increases as the way to return the News to profitability.¹⁹³

108. In addition to circulation prices, the Detroit newspaper war has been bitterly fought in the advertising price sector. Newspapers typically publish their advertising prices in "rate cards". These rate cards generally establish different rates per line for different types of advertising and provide reduced rates for larger quantities. In addition, combination rates are offered for purchases of space in multiple issues or sections such as daily-Sunday or part-run—full-run combinations.¹⁹⁴

¹⁹⁰Neuharth 1617-18, 1738-39, 1748, Nelson 3411-13; NX 300F-G, J-M, S-T ¶¶ 16-18, 26-28, 31, 33, 44-45 (Neuharth). See also IX 256B.

¹⁹¹Morton 2182.

¹⁹²See Clark 1355, Neuharth 1687, 1714-15, Chapman 1969-70, Rosse 2385, 2465-67, Nelson 3367-69, 3434-35; NX 100Z-40 ¶ 135 (Chapman).

¹⁹³AX 557A, AX 558E, AX 559A, AX 560A; IX 165B, IX 169B.

¹⁹⁴NX 100J-K, M ¶¶ 22-23, 28 (Chapman), NX 201A-P, NX 202A-L, 203A-H, NX 837. In addition to consulting rate cards, advertisers are interested in the "milline rate", that is, the cost of reaching a million households with a line of advertising. NX 100K-L ¶ 25 (Chapman), NX 700V-W ¶¶ 33, 34 (Morton). While the News's milline rates in the PMA were consistently lower than the Free Press's (NX 700Z-2 to Z-23 ¶¶ 77-78 (Morton), NX 800Z-48 to Z-49 ¶ 139 (Rosse), NX 822A-D)) the Free Press rate is lower based on total circulation. AX 534F.

109. Detroit advertising rate cards bear little resemblance to the actual prices paid. And while the published rates of the Free Press and the News have increased each year since 1976¹⁹⁵, severe discounting is rampant at both papers to the point that Detroit newspaper advertising rates are among the lowest in the nation.¹⁹⁶ Discounting of advertising rates has severely impacted on Free Press and News profits.¹⁹⁷

110. There is no convincing evidence that the Free Press, without regard to the News's reaction, could increase its advertising revenue by adhering to published rates (i.e., by refusing to discount).¹⁹⁸ The record indicates that any attempt by the Free Press to increase unilaterally the price of advertising would result in still further erosion of its share of lineage, which would give the News additional circulation, a still lower milline rate in the PMA, and greater attraction as a duplicate buy.¹⁹⁹

¹⁹⁵Hall 1092, 1270, Lawrence 3022-23; NX 200Z-14 to Z-15 ¶ 83 (Hall), NX 617A-B; IX 35D.

¹⁹⁶Clark 1373-74, 1376, 1395, 1467-68, Chapman 1953, 2065, Lawrence 2964, Nelson 3368, 3373; NX 100J-K ¶ 23 (Chapman), NX 200Z-16 to Z-17 ¶ 86 (Hall), NX 800Z-48 ¶ 138 (Rosse); AX 503E, AX 504D, AX 534C-F, AX 538A-B, AX 539A, AX 541A, AX 546A-B, AX 581C; IX 164A, IX 219, IX 256B, IX 361.

¹⁹⁷AX 503E, AX 534A; IX 219.

¹⁹⁸Clark 1373, Neuharth 1539, Lawrence 2882-83, Nelson 3434; NX 100Z-48 ¶ 152 (Chapman), NX 200Z-14 to Z-18 ¶¶ 83-88 (Hall), NX 700Z-20 to Z-23, Z-38 to Z-39 ¶¶ 76, 78, 104, 105 (Morton), NX 800Z-48 to Z-49, Z-52 to Z-53 ¶¶ 138-39, 145-46 (Rosse); AX 546A-B.

¹⁹⁹Hall 1272, Chapman 1961-62, Morton 2355-61; NX 100Z-48 ¶ 152 (Chapman), NX 200Z-14 to Z-18 ¶¶ 83-88 (Hall), NX 400Z-4 to Z-5 ¶ 66 (Clark), NX 700Z-20 to Z-23, ¶¶ 76-78 (Morton), NX 800Z-48 to Z-49 ¶ 139 (Rosse); AX 534F, AX 536A. Similarly, estimates made by the News's staff showed that the News could not unilaterally adhere to rate card prices. AX 546A-B. See also Clark 1373-74 for evidence that in the face of Free Press discounting, the News had to discount in order to hold on to the lineage lead.

111. It is also clear that at least prior to the Gannett acquisition there was no inclination at the News to give the Free Press breathing space in the form of a News-initiated cease fire in the advertising discount phase of the Detroit newspaper war.²⁰⁰ On the contrary, despite the prospect of deep losses for each year since 1981, the News resisted any advertising price increases (in the form of a return to rate card prices) as part of its strategy of achieving market domination or alternatively the negotiation of a favorable JOA.²⁰¹ Gannett has thus far followed a similar policy which has been summarized by a News executive as "no thought to have realistic rate card pricing *now*".²⁰²

112. Free Press executives stated that neither the News nor the Free Press is likely to initiate an advertising price increase because their pricing flexibility is limited by competition from other media.²⁰³ This testimony is entitled to no weight. For despite competition from other media (and the possibility of some loss of advertising to these competitors if rates are increased) it is virtually certain that advertising prices for the combined Free Press and News will increase if JOA is approved.²⁰⁴ Besides, newspapers outside of Detroit, which charge much higher advertising rates than the Free

²⁰⁰Clark 1394-96, Nelson 3409-10; NX 400Z-4 to Z-5 ¶ 66 (Clark).

²⁰¹Hall 986, Clark 1371-74, 1394-96, Nelson 3367-69, 3373, 3409-10. The News's strategy can be justified in terms of the positive effects on the Free Press of an advertising price increase. Free Press executives estimated that if advertising rates in Detroit were to become consistent with other markets, this would generate \$14 million for the Free Press and return it to profitability even without a circulation price increase. AX 534A.

²⁰²IX 256B. See also Neuharth 1528-30, 1617-18, 1633, 1738-40, IX 274B.

²⁰³Hall 1092, 1270, Lawrence 3017.

²⁰⁴See Finding 117.

Press or the News, are flourishing, reflecting generally the perception of many advertisers that newspaper advertising represents a unique method of conveying commercial messages.²⁰⁵ As it happens, Detroit, in contrast to other metropolitan areas, is characterized by relatively little effective competition from suburban papers which suggests that there is less not more pressure on Applicant's advertising rates than exists elsewhere.²⁰⁶ As for the contention that Gannett has no incentive to increase advertising prices since it is in a "win/win" situation (that is, it will either gain dominance and future profitability or a JOA on the basis of the Free Press's poor financial performance²⁰⁷), this argument fails to take into account the record proof that neither paper can gain profitability if the JOA is denied and present pricing practices continue.²⁰⁸

113. Contemporaneous evaluations indicate that at higher circulation and advertising prices, Detroit can sustain two profitable newspapers. The record shows the following:

²⁰⁵Newspapers have generally performed impressively against other media in recent years. After suffering a sharp decline following the initial growth of television, newspaper advertising is now growing faster than either television or radio. See Chapman 1989, 1992-93, Morton 2165-73, Rosse 2601-02; NX A, pp. 8, 11; AX 578B-C; IX 131E. Many advertisers favor newspaper advertising because it requires a purchase, it allows for instantaneous changes in content, and it passes from hand to hand to all the persons in a household. Morton 2221-23, Lawrence 3021-22; NX 700X ¶ 37 (Morton). See also IX 131E.

²⁰⁶Rosse 2597-99; NX 816A-K; AX 509B; IX 22A.

²⁰⁷See Finding 95. See also IX 395A for ENA's articulation of a similar policy.

²⁰⁸See finding 107. Note, moreover, that Neuharth "did not preclude [an advertising increase] in the normal course of business". Neuharth 1740. See also Neuharth 1699-1701, 1705-06, 1709-1722, and IX 170A-H for evidence that even without a JOA, Gannett may eventually have to move to higher prices in order to justify the ENA acquisition and to prevent dilution of corporate earnings with the adverse effect this would have on Gannett common stock.

In September 1982, the Free Press projected profits on the basis of a circulation price increase alone.²⁰⁹

In August 1985, Free Press management stated that —

... if competitive pricing becomes rational and consistent with other markets around the country the Free Press would have generated another \$14 million in advertising for the year 1985. We would have been profitable without a circulation price increase.²¹⁰

In an October 1985 presentation to Knight-Ridder executives, Free Press management sized up the Detroit market as follows:

We are structuring this process in terms of action by the News and reaction by the Free Press for two basic reasons: First, the News is the current unit leader in our market. Second, one of the prerequisites to returning to profitability — for both newspapers — is restoring rational pricing in the market. Within the limits of the law and sensible business practices, we would hope the News would adopt more realistic (meaning higher) prices in both advertising and circulation. Looked at another way, our reactive posture actually will be a pro-active strategy.²¹¹

²⁰⁹AX 514A. On the other hand, Chapman predicted losses of almost \$40 million in the following four years if circulation prices were not increased. AX 514B.

²¹⁰AX 534A. See also Hall 1091.

²¹¹AX 504U. The Free Press calculated that if it increased its daily price to 25¢, it would result in an increase in monthly operating profit of \$550,000 while each 5¢ increase in the price of the News would increase its monthly profit by \$575,000. AX 504V. At the same time it was estimated that a Sunday price increase to \$1.00 would result in a monthly increase of operating profit for the News of \$711,000 and \$603,000 for the Free Press. AX 504W.

In March 1986, Free Press management declared "If you recast 1985 with the Free Press at 25¢ daily and \$1 Sunday, our bottomline picture would have improved by \$13 million."²¹² The same planning document connected profitability to an annual 8% increase in advertising rates.

The five year forecast for the News (drawn up in March 1982 at the height of the auto industry depression) projected profits of \$3.7 million by 1984 if there were circulation and advertising price increases.²¹³

Applicants' retained expert, John Morton, said in November 1983 that "Both newspapers in Detroit were profitable until 1980, and both could make money now if circulation prices were higher".²¹⁴

In 1983, the ENA Vice-President for finance projected from an economic model that under conditions of "normalized competition," the Free Press would earn \$1.5 million per year and the News \$5 million.²¹⁵

In August 1985, Gannett was informed that by increasing the daily price of the News to 20¢ it could increase operating income by nearly \$4 million per year and "put The News in the black in 1986 with an operating income of \$2,171,000".²¹⁶

²¹²AX 503G-H. The January 20, 1986, draft budget of the Free Press projected a sharp reduction in Free Press losses on the basis of a daily circulation price increase to 25¢. Hall 1088, 1318-19; AX 553A. Cancellation of this price increase was estimated to have cost the Free Press \$4.3 million. IX 231E-F.

²¹³Clark 1418-22; IX 36A to Z-35. The cost to the News of maintaining a 15¢ cover price has been estimated at \$7 million a year since 1979. AX 501H.

²¹⁴Morton 2370-71.

²¹⁵IX 72H.

²¹⁶IX 162W. See also IX 165B.

In still another August 1985 assessment (characterized as "too optimistic"), Gannett officials projected that if the daily price increased to 25¢ in January 1986 and then 35¢ in January 1987 (with the Sunday paper at \$1.00) profits would be \$7.2 million in 1986, \$21.7 million in 1987, and \$26.4 million in 1988.²¹⁷

114. Beyond the generalizations noted in Finding 113, Intervenor and the Antitrust Division presented no economic model showing the level of circulation and advertising prices required to return the Free Press and News to profitability or how these price increases would impact on demand functions. Since the Free Press is already at 20¢ for its daily paper, any revenue it can reasonably anticipate from a daily circulation increase (i.e., to 25¢) might not be a guarantee of profitability.²¹⁸ Speculation about an additional increase in Sunday circulation price seems perilous at best given the poor consumer reception in 1985 when both papers increased cover prices from 50¢ to 75¢. Based upon these considerations, it is fair to assume that if a JOA application is denied the Free Press and the News will have to consider market strategies that would allow for an increase in both circulation and advertising prices in order to bring them well into the black.²¹⁹

115. If circulation and advertising prices do not increase, Detroit cannot sustain two profitable papers as shown in the financial results reported in Findings 83 and 92 and the following:

²¹⁷AX 558A, E. See also AX 559A and AX 560A for similar assessments in September and December 1985. Free Press management had reached conclusions which substantially agreed with these News projections. IX 315A-C.

²¹⁸See AX 504V-W, IX 46, IX 99L for the wide range of possible revenue gain from a circulation increase.

²¹⁹See Hall 1091, AX 534A, IX 35C.

In a December 1981 assessment which took into account "the unpredictability of the Detroit News primarily as it relates to their willingness to incur substantial operating losses through wholesale discounting to advertisers and through circulation promotion and pricing policies"²²⁰, Free Press planners concluded:

... we cannot let our assault on the News' lead be anything less than sustained. The sense is more widespread than ever that the conditions of metropolitan dailies in general and the Detroit economy in particular have changed in some basic ways. We can no longer count on the long-range prosperity of two 600,000-plus-circulation daily newspapers in this city. The recent examples of the Washington Star, the Philadelphia Bulletin, the New York Daily News are sobering. And economic forecasts indicate the economy of Detroit and southeastern Michigan is in for a long and painful readjustment as it struggles toward diversification while its current base, the auto industry, sorts out some fundamental changes.²²¹

In March 1982, the Free Press's future profitability was directly linked to increased circulation rates²²², and in October of that same year, a Free Press executive concluded that so long as the News continued its policies (low circulation prices and advertising rate discounts) "I do not see how two newspapers in this market will ever show a profit".²²³

²²⁰IX 26C.

²²¹IX 26Z-77. The same thoughts were expressed in September 1982. IX 27B. See also Clark 1398-99 for similar views at the News about Detroit's inability "to sustain two major daily newspapers in competition."

²²²NX 852J.

²²³AX 508C. See also IX 35C, IX 42A, IX 55B.

In September 1983, Free Press planners concluded that without a JOA there could be no profitability in Detroit because of advertising rate discounts and resistance to circulation pricing action.²²⁴

116. Marilyn Simon, an economist on the staff of the Antitrust Division and a knowledgeable student of the newspaper industry, testified that she knows of no independent action, either in the form of unilateral price increase or otherwise, that could return the Free Press to profitability.²²⁵

117. If the JOA is approved, it is a virtual certainty that both circulation and advertising prices of the combined Free press and News will increase.²²⁶ The profitability of the JOA is premised on just an increase.²²⁷

3. Lower Costs

118. The record does not show that the Free Press has aggressively pursued a cost-cutting strategy even though strin-

²²⁴IX 75A.

²²⁵Simon 3243-44.

²²⁶Neuharth 1621, Chapman 2066, 2069-70, Morton 2289, Rosse 2593, Lawrence 3022-23; IX 280A. Chapman believes that even with higher advertiser rates under the JOA, this will be a good buy for advertisers. Chapman 2062-72.

²²⁷AX 305A-C, AX 558E; IX 169A-E, IX 170A-H, IX 176B-C, IX 220A-G. The JOA will also profit from lower costs attributable to plant closings and lay-offs. AX 558A-F. However, by far the largest cost savings will come about as a result of the anticipated drop in combined circulation which will result in a substantial "newsprint savings." IX 165H. The same savings presumably would be available should circulation decline following a price increase without a JOA. See IX 46. If there is any fall-off in circulation following a JOA price increase, it is estimated that it would approximate the circulation decline following any News and Free Press price increase without a JOA. Rosse 2749.

gent budgetary restraint has been the hallmark of survival by metropolitan papers engaged in a head-to-head competitive struggle.²²⁸ The Free Press has never been required to implement a budget cut.²²⁹ Moreover, in planning the various Tiger initiatives Free Press and Knight-Ridder executives assumed that during the struggle for dominance (or alternatively a favorable JOA) expenditures (and losses) would continue to mount while cost-cutting was not to be actively pursued.²³⁰

119. The question of how much room there actually is for cost-cutting was largely avoided by both Intervenor and the Antitrust Division. The largest expenses incurred by the Free Press are labor and employee benefits amounting to 48% of the paper's total operating revenue.²³¹ Any attempt at savings in this area is bound to run up against union opposition. As John Morton, Applicants' retained expert, observed in August 1985:

Strong labor contracts would make sharp cost cutting quite difficult. And as long as a JOA were being considered as a possibility somewhere down the road, both papers might be loath to cut costs or raise prices too swiftly, because any sustained move toward profitability could haunt them during the eventual JOA hearings in which one or both papers would plead for relief from uncontrollable losses.²³²

²²⁸Hall 1220, Morton 2215-16, Rosse 2462; IX 55B, IX 364H, Z to Z3. Another tack followed by cost-conscious papers is to eliminate circulation that adds to total figures but is not prized by advertisers, i.e., so-called "ego circulation". See Rosse 2753-54, AX 559B.

²²⁹Hall 1142-43, Lawrence 2896-98.

²³⁰Hall 926, Morton 2321-22; AX 515A-F; IX 161Z-21 to Z-24, IX 110A.

²³¹NX 100Q-R ¶ 37 (Chapman).

²³²AX 581C. See also Hall 1083-84, 1220.

120. Intervenors in particular presented a feeble case for making any assumptions about cost-cutting. While they cite the fact that the Free Press's labor expenses as a percent of revenue increased at a faster rate than the News's comparable expenses²³³, these major Detroit area newspaper unions presented no testimony in elaboration of the Free Press's view that recent labor negotiations presented "a great opportunity to reduce or eliminate any inefficient work practices and contract provisions that restrict the effective utilization of our employees"²³⁴ or Gannett's view that Detroit offered some good opportunities for "taking on the unions" in order to reduce costs.²³⁵ As far as this record will allow, the Detroit unions have simply not been willing to accept less than the wages and benefits offered by metropolitan papers in other areas, and accordingly there is no basis for speculating about the possibility of cost savings in this area without a JOA.²³⁶

4. Other Strategies

121. Intervenors and the Antitrust Division have suggested that the Free Press could possibly carve out for itself market segments based on either geography or demographics which could assure profits. If a city's population is large enough there may be a potential for segmentation to occur within a single

²³³NX 603A, NX 615A. See also IX 316A, IX 465, IX 466.

²³⁴IX 99Z-125. See also AX 550A-F.

²³⁵IX 170A.

²³⁶Hall 1256-57; IX 84G. See also Hall 1231, 1258-59, Chapman 1963-64, Morton 2279-80, NX 700Z-35 ¶ 99 (Morton). There are other labor issues in the Detroit newspaper industry which are clearly beyond the scope of this proceeding such as union opposition to joint bargaining by the Free Press and the News on economic issues (Hall 1254-55, Nelson 3380; IX 191A-D) and a dispute as to union access to the newspapers' books. Nelson 3380-81; IX 84A-E.

metropolitan area. But even in the largest cities such segmentation has been rare and there is no evidence that geographic segmentation is feasible in Detroit.²³⁷ As for the possibility of emulating the *New York Times* and attempting to achieve demographic segmentation based on isolating "up-scale" readership, this is even more difficult to achieve than geographic segmentation, and even an attempt to skew a paper toward a particular segment of the population could result in a loss of general readership. In any event, there is no evidence that such a strategy would succeed in Detroit notwithstanding some indication that from time to time the Free Press has enjoyed better demographics than the News.²³⁸

122. Intervenors have also argued that there may be available to the Free Press alternative forms of financing should Knight-Ridder decide to discontinue its largess. There is no support in the record for this proposition.

123. The question of a possible acquisition of the Free Press came up late in this proceeding. On August 4, 1987, Knight-Ridder received an inquiry about a possible sale of the Free Press to the publisher of the *Chicago Sun-Times*, the junior Chicago paper which had just completed the most successful year in its history.²³⁹ Whether or not this is a serious offer

²³⁷NX 100Z-3 to Z-6 ¶¶ 59, 63 (Chapman), NX 200D-E ¶ 11 (Hall), NX 700D-G ¶¶ 6-9 (Morton), NX 800Z-5 to Z-20 ¶¶ 49-75 (Rosse). To the extent that specific geographic areas represent an attractive market, they are already targeted within the Free Press's zoned editions. See Hall 939-40, 943-45; NX 100Z-4 to Z-6 ¶¶ 62-63 (Chapman).

²³⁸NX 100Z-6 to Z-7 ¶¶ 64-67, (Chapman), NX 700G-L ¶¶ 10-16 (Morton), NX 800Z-5 to Z-20 ¶¶ 49-75 (Rosse). As far as this record will allow, Detroit has a "relatively homogenous population with similar news priorities and definitions of good coverage". AX 570Z-3.

²³⁹IX 518A; AX 2A. The Free Press and Knight-Ridder have made no efforts on their own to find an alternative purchaser. Chapman 1982-83; NX C-1, p. 15.

and how the publisher of the *Chicago Sun-Times* would proceed to return the Free Press to profitability were issues not developed on the record.

5. Some Predictions

a. Chapman

124. Alvah Chapman, the Knight-Ridder CEO, testified that he will shut down the Free Press if the JOA application is denied.²⁴⁰ The record, however, contains no convincing evidence that he seriously considered closing the Free Press prior to his witness stand bolt out of the blue and accordingly I have assigned little weight to this threat. There are no contemporaneous documents indicating that this recommendation had been pressed before the Knight-Ridder Board.²⁴¹; on the contrary, the record shows that the Knight-Ridder Board has approved costly Free Press expansions and the newspaper's executives have been proceeding on the assumption that the Free Press would not be closed even if the JOA were to be denied.²⁴² It should be further noted that Knight-Ridder has never shut down a single paper²⁴³, and Chapman did not rule out finding a buyer interested in operating the Free Press should it ever reach the point when Knight-Ridder would no longer wish to challenge Gannett for the rich Detroit market.²⁴⁴

²⁴⁰Chapman 1959-66.

²⁴¹See Chapman 1793-95, 1966-67. See also AX 8A-B. The closing option was raised in 1982 (AX 514C) but was emphatically rejected as the Free Press and Knight-Ridder proceeded forward with the increased spending inherent in the Tiger plans. See Findings 19, 28, 32-33 and Chapman 1872-74, NX 100Z-21 to Z-22 ¶ 96 (Chapman).

²⁴²AX 515A-F. See IX 268A for evidence that as late as June 1986, Lawrence, the Free Press's publisher, was planning for an expansion "regardless of the outcome of the JOA". See also AX 300C ¶ 5 (Baseman).

²⁴³Chapman 2148.

²⁴⁴Chapman 1980-81.

Finally, if a Free Press closure was imminent, it would have made no economic sense for Neuharth to agree to share the prospective JOA profits with Chapman since Gannett could have realized a monopoly return by simply waiting for the Free Press to fold.²⁴⁵

b. Rosse

125. Applicants rely heavily on the opinions of John Rosse, an expert in the field of newspaper economics. Citing the Free Press's financial losses since 1980, the significant decline in the size and economic vigor of the Detroit market, and the News's lead in advertising revenues as well as certain key circulation areas, Rosse concluded that the Free Press viewed on a stand-alone basis is in probable danger of financial failure and can only be saved by a JOA.²⁴⁶

126. As Rosse would have it, the root cause of the Free Press's problems is the pivotal role played by economies of scale (the decline in the average cost of producing a unit of a commodity as the quantity produced increases²⁴⁷) in newspaper competition. Rosse argued that these economies exist principally (but not solely) because expenses incurred in creating and composing content (reporting news, editorial contributions, editing, composing, platemaking, typesetting and some of the costs of selling and preparing advertising) are imbedded in the cost of the initial newspaper, and thus the average cost attributable to these "first-copy" expenses fall as number of copies circulated rises. Economies of scale, ac-

²⁴⁵Baseman 3205-07; AX 300A to Z-2 ¶¶ 1-66 (Baseman). By the same token, if Knight Ridder was seriously contemplating closure, it would not have turned down, as apparently it did, JOA opportunities offering it 40% or 45% profit splits. AX 300D ¶ 6 (Baseman).

²⁴⁶NX 800C-J, Z-53 ¶¶ 7-11, 147-149 (Rosse).

²⁴⁷NX 800'I', K ¶¶ 10, 13 (Rosse).

cording to Rosse, also exist because some costs of producing and distributing a paper (such as the cost of maintaining a home delivery and street-sale system and the cost of circulation promotion) do not increase or increase less than proportionally when the number of pages in a paper increase. After finding that the News enjoys a significant cost advantage over the Free Press due to scale economies, Rosse concluded that this advantage creates an unstable equilibrium which will lead eventually to the demise of the Free Press.²⁴⁸

127. The applicability of Rosse's scale economies analysis to the Detroit market is questionable on several grounds. In the first place, his econometric research came down to a selection of just one from at least four candidates for the average unit costs of these two large newspapers. As it happens, the average cost per copy for the News is higher than the average cost per copy of the Free Press. Similarly, the average cost per page for the News is higher than the per page cost for the Free Press.²⁴⁹ After recovering from this "startling observation"²⁵⁰, Rosse proceeded to calculate what he described as a more reliable measure of scale economies in the form of operating expenses applied to the number of pages produced

²⁴⁸Rosse 2550-51, 2671-73; NX 800K to Z-5 ¶¶ 14-48 (Rosse).

²⁴⁹Rosse 2434, 2648, 2650-57, 2795; NX 800V-W ¶ 33 (Rosse), NX 804A, NX 805A, NX 806A, NX 807A, NX 809A-B, NX 810A-D.

²⁵⁰Rosse 2646 or, as Rosse put it elsewhere, "...the advantages for the News that the presence of economies of scale predicts are not readily apparent". NX800 N ¶ 33 (Rosse). The News's economies "may" or "could" be hidden by reason of its greater Sunday circulation and larger number of pages. According to Rosse, "If a newspaper contains more pages, it may cost more per copy than a smaller newspaper with lower circulation, because the economies of scale in copies is hidden by increased cost from the larger number of pages in each copy. In other words, all else is not equal in this comparison of average cost per circulation because the number of pages published also differs. Similarly, ...the larger number of copies could cause the paper with more pages to have higher cost per page, because the greater number of times each page is printed masks the effects of economies of scale in pages." NX 800W-X ¶ 34

multiplied by paid circulation, the so-called "page impression" measure. But on this course too, Rosse first had to reject at least one proxy for page impressions — full run pages multiplied by circulation — which produced results indicative of roughly similar per unit costs for the two papers over a 10-year span.²⁵¹ Finally, Rosse arrived at a second proxy for page impressions — tons of newsprint consumed — which showed that Free Press costs exceeded News costs by .53% to 5.86% between 1982 and 1986.²⁵² The usefulness, however, of this entire exercise is thrown into doubt by Rosse's concession that the significance of scale economies generally declines as newspaper size increases²⁵³, which at least indicates that verification of relative superior economies for newspapers of the size of the Free Press and the News requires more persuasive

(Rosse). While these possibilities weighed heavily in Rosse's rejection of average cost per copy and per page, he gave short shrift to the equally plausible likelihood that at such high circulation levels the cost of attracting additional circulation has the effect of defining a cost curve which differs markedly from what his research on smaller papers had predicted. As it happens, in his scale economies analysis based on copies and pages Rosse excluded as variable or marginal costs the demand-enhancing expenses which he had identified as the very areas where the News outspends the Free Press. Rosse 2428-32, 2626-28, 2658-60. Their inclusion, which is at least arguably proper if the issue is the existence of an unstable equilibrium, would have altered Rosse's cost curves even further in the Free Press's favor. Rosse 2430-32, 2790, Simon 3249; AX 100U, Z-2 to Z-3 ¶¶ 16-29, 37 (Simon). As for the variable costs which were included in Rosse's scale economies analyses based on copies and pages, the record indicates that there is a high degree of subjectivity involved in their selection. Rosse 4211-13, 2416, 2790; NX 808A-M; AX 100S-T ¶ 27 (Simon).

²⁵¹Rosse 2654, NX 800X to Z-1 ¶¶ 36-39 (Rosse); NX 811A-B. In the use of this proxy there may have been a bias against the Free Press since the methodology favors the paper (here, the News) with the most full-run editions and the largest number of home delivery sales. Simon 3233-36; AX 100 to Z-2 ¶¶ 32-36 (Simon).

²⁵²Rosse 2661-68; NX 800Y to Z-4 ¶¶ 38-42 (Rosse), NX 812A-B, NX 843A-B.

²⁵³See Rosse 2424-2427, 2483-84, 2483-84, 2636-37; 2782-83, Simon 3249-52; NX 800Q-R ¶ 22 (Rosse).

evidence than the highly conflicting results reported by Rosse. But even assuming that Rosse's ultimate page impression analysis represents some indication that the News enjoys some costs advantages, there is no proof whatsoever that this highly speculative advantage has had or is likely to have a decisive impact. According to Rosse, the News has put its cost advantage to use by outspending the Free Press on editorial and promotional expenses.²⁵⁴ But Rosse never explained how this use of efficiencies even comes close to being crucial given the fact that the News has enjoyed all or part off this advantage for close to 30 years and has barely been able to maintain a small circulation lead while incurring large losses. Besides, Rosse conceded that these additional promotional and editorial expenditures by the News may be offset by a whole range of factors including differences in managerial and editorial skills.²⁵⁵

128. The limitations of Rosse's scale economies analysis is revealed most plainly in what he did not claim. Rosse, who has testified in favor of every contested JOA application, has previously indicated that the power of scale economies in newspaper competition is manifested in what has been described as the "downward spiral" hypothesis which holds that in two-paper markets the dominant paper will inevitably assert its cost advantage to gain a decisive advertising or circulation lead. The theory then goes on to predict that once the junior

²⁵⁴Rosse 2437-38, 2658-61; NX 800Z-2, Z-4 to Z-5, Z-27 ¶¶ 27, 45, 47 (Rosse), NX 813, NX 817, NX 819.

²⁵⁵See Rosse 2430-34, 2437-39; NX 800V, Z-27 ¶¶ 32, 90 (Rosse). Significantly, it is usually the weaker paper that spends more on promotion. Morton 2245, 2455. And Rosse conceded that the volume of expenditures on editorial content tells us little about the relative quality of the papers. Rosse 2434-39. This concession may in part recognize the eleven Pulitzer Prizes won by Knight-Ridder between 1984-86, more than any other newspaper group has ever won in so short a period, as well as the many editorial achievements of the Free Press itself. See Rosse 2436, NX C-1, Appendix II, p. 3, NX C-3, Ex. 31.

newspaper suffers a significant circulation or advertising disadvantage, it is virtually impossible to recover against a senior competitor since advertisers value higher circulation and subscribers value a paper's advertising content, and therefore weakness in either advertising or circulation manifests itself first in a decline in one and then the other, and so on irreversibly.²⁵⁶

129. According to Rosse the historical validity of the economies—induced downward spiral has been verified in the demise of all but a few of the junior metropolitan dailies which have faced direct competition from a dominant rival.²⁵⁷ Because of this history, Rosse endorsed the Free Press's (and the News's) strategy of seeking market dominance or alternatively a JOA.²⁵⁸

130. Whether junior paper collapse is inevitable or not²⁵⁹,

²⁵⁶Rosse 2555-56; NX 800'O', Z-22 to Z-23, Z-30 to Z-33, Z-51 ¶¶ 20, 95-100 (Rosse). In the usual statement of the interrelationship, it is said that advertising usually follows circulation trends by several years. Rosse 2522.

²⁵⁷NX 800H-'I', Z-5, Z-51 ¶¶ 8, 9, 20, 48, 143 (Rosse). See also NX 700N-'O' ¶¶ 18-19 (Morton), NX 702-705.

²⁵⁸Rosse 2444-45; NX 800Q, Z-33 ¶¶ 21, 100 (Rosse).

²⁵⁹See e.g., Morton 2215-16, Rosse 2390, 2393, 2478, 2517-21, 2603-04, 2676, 2744, 2811-12, NX 803, AX 1B, AX 2A-B, IX 450J-L ¶¶ 32-38 (Dean). The notion that the junior paper faces inevitable extinction is ambiguous at best since the designations "dominant" and "junior" are not etched in stone. This is best seen in Philadelphia where the Knight-Ridder papers overcame a substantial daily circulation lead (and six years of losses) to triumph over the rival *Bulletin*. IX 364A, IX 367A-B, IX 397A-B. See also Rosse 2602-04 for evidence that in San Francisco the roles of "junior" and "dominant" were reversed despite scale economies. There is also some evidence that in recent years junior papers have been able to prosper in large metropolitan areas. See Rosse 2390-91, 2393, 2478, IX 518A. Besides, the very notion of the inevitable demise of a junior paper loses some of its force as applied to Detroit where the "junior" and "senior" papers have been fighting it out for almost 27 years and during most of that time both were profitable.

both elements of the downward spiral hypothesis are missing from the huge Detroit newspaper market. To begin with, there is no dominance in the Detroit market in the sense that one paper is overwhelmingly strong while the other is hanging on by its fingertips.²⁶⁰ As indicated in Finding 48, at the time the JOA was announced Applicants declared that they had fought to a virtual draw. Moreover, to the extent that the hallmark of dominance is the profitability of one and the losses of the other²⁶¹, here we have an entirely different picture: the Free Press was profitable until 1979, and both papers have had large losses since then.²⁶²

131. Most significantly, Rosse flatly acknowledged that the Free Press was not in a downward spiral²⁶³ and in that respect the Detroit newspaper market was drastically different from what he had observed in Seattle and Cincinnati where long-term trends (over 20 years) revealed that the paper which claimed to be failing was falling behind in circulation and slipping into the downward spiral.²⁶⁴ These long-term trends, so essential to Rosse's analysis in Seattle and Cincinnati, were not even charted by him in Detroit because there was no downward spiral.²⁶⁵ Rosse further acknowledged that the pat-

²⁶⁰Chapman 1945-46; but Chapman almost immediately recounted by saying that he "always considered the News dominant" (Chapman 1767), a claim which in turn is flatly contradicted by AX 506A-C. See Finding 49 and IX 40A.

²⁶¹See Rosse 2556.

²⁶²The News's losses have been greater than the combined losses of all other papers which have claimed "failing company" status under NPA. IX 450G-H ¶ 25 (Dean).

²⁶³Rosse 2448-52, 2457, 2467-68, 2544, 2550, 2812-14.

²⁶⁴Rosse 2521, 2531-34, 2540-41, 2544, 2680.

²⁶⁵Rosse 2525-49. See IX 506, IX 517. In Seattle, the failing newspaper had consistently lost circulation and advertising over a 20 year period. There was a similar decline in Cincinnati. IX 450D-F ¶¶ 12-17 (Dean).

tern of downward spiral which he had observed in other metropolitan areas could not be achieved in Detroit given the will of the two chains involved to avoid it.²⁶⁶

c. Morton

132. John Morton, Applicant's other retained expert and a newspaper industry stock analyst, testified that the Free Press was in such a seriously weakened position that it could not survive on a stand-alone basis and that its only hope was a JOA.²⁶⁷ Morton's testimony, however, is hardly entitled to any weight when considered in the light of his pre-litigation assessment of the Detroit newspaper war. In April 1982, Morton stated that the News was in greater risk of financial failure than the Free Press because "the long term trends in that market have been favoring the Free Press."²⁶⁸ In November 1983, Morton wrote that "both newspapers in Detroit were profitable until 1980, and both could make money now if circulation prices were higher".²⁶⁹ In October 1984, Morton wrote that the "Detroit Free Press, which has made significant product improvements this year, has been growing twice as fast in circulation as the competing Detroit News, despite the Free Press's higher price."²⁷⁰ In his August 31, 1985, newsletter, Morton wrote

Even if significant competition between the two dailies continues, the Free Press retains the inherent advantage of morning publication, and it now has management officials in place who are fresh from the

²⁶⁶Rosse 2467-69.

²⁶⁷NX 700Z-27, Z-34 to Z-35, Z-40 ¶¶ 86, 97, 109 (Morton).

²⁶⁸Morton 2189.

²⁶⁹Morton 2370-71.

²⁷⁰AX 579D.

drawn-out — but highly successful — fight for ultimate dominance in Philadelphia. The only scenario that we can envision that could hurt Knight-Ridder in Detroit is the unlikely one that Gannett would pull out all stops and move The News to morning publication, going head to head with the Free Press for that potentially more lucrative publishing cycle. As Times Mirror has discovered in both Denver and Dallas, such a move posed a great financial risk on the afternoon paper, and we doubt that Gannett would find the risk worthwhile. Thus, we stress that Knight-Ridder appears well positioned for any likely change in Detroit, and that company earnings could benefit handsomely.²⁷¹

As late as February 1986, Morton was of the view that if the Detroit newspaper war was to continue the News was “at greater risk” than the Free Press.²⁷² Morton saw a ten-year trend favoring the Free Press and he emphasized that because of its strong morning franchise it was positioned to avoid the downward spiral and overtake the News.²⁷³ Even after the JOA was announced in April 1986, Morton said, “the Free Press is doing better than the News” and “if everything remained equal and the Free Press remained the morning newspaper and the News remained the afternoon paper, basically in the long run that would catch up with the News.”²⁷⁴

²⁷¹AX 581C-D.

²⁷²Morton 2193.

²⁷³Morton 2191-92.

²⁷⁴Morton 2332-33. Morton’s claim that his entire pre-litigation evaluation of the Detroit newspaper war suffered from a lack of knowledge of the financial condition of the News (see Morton 2341-46) is not credible given the magnitude of the News’s losses. See Finding 92.

133. Morton, who shared Rosse’s pre-litigation view of the importance of the downward spiral²⁷⁵, testified that the Free Press was not in one.²⁷⁶

d. *Baseman.*

134. Based upon a careful analysis of the present discounted value to Gannett of the 50/50 profit split (estimated at \$475 million) and the likely future monopoly profits to Gannett in the absence of a JOA (that is, with the presumed failure of the Free Press), the Antitrust Division’s retained expert, Kenneth Baseman, concluded that the JOA profit split represented a recognition by Gannett that the Free Press would remain in existence for at least seven to ten years; otherwise, Gannett would have found it more profitable to wait for the Free Press to fail.²⁷⁷ Baseman’s analysis assumes that Knight Ridder will continue to subsidize the Free Press during this interval.²⁷⁸

²⁷⁵See Morton 2245-47.

²⁷⁶Morton 2240-41.

²⁷⁷Baseman 3148, 3189; AX 300A to Z-2 ¶¶ 1-66 (Baseman). The validity of Baseman’s analysis is supported by IX 14A-B which shows that the Free Press made precisely the calculation which Baseman predicted that newspapers make, i.e., a comparison of future monopoly profits as against the profits to be derived from a JOA. See also AX 508C; IX 75A-B, H. Similar calculations were made at ENA, Gannett, and the News. IX 72A to Z-36, IX 170A-H. The 50/50 profit split should be contrasted with the JOA splits in Cincinnati (80/20) and Seattle (68/32). AX 300H-“I” ¶¶ 18-19 (Baseman); IX 236A-D, IX 450G ¶ 20 (Dean), IX 454. As a senior Knight-Ridder executive pointed out “There is little parallel between the Seattle/Chattanooga/Cincinnati agreements and the present situation in Detroit. Neither Detroit newspaper is dominant in the sense of conditions reflected in those markets.” IX 40A. While the 50/50 split does not become operational until the sixth year of the JOA, the parties recognized that because of start-up costs the JOA will probably not move into its most profitable mode until then. Chapman 1942-43.

²⁷⁸Baseman 3143.

135. Applicants argue unpersuasively that the significance of the 50/50 split was overstated by Baseman because Gannett in effect traded future profits for control of the JOA. In the first place, on major issues of governance (initial contributions, capital expenditures, cash distributions, sale of assets, borrowing, volume of news content, use of color, and the form and structure of the weekend editions) Gannett has no effective control since nothing can be done without Knight-Ridder approval.²⁷⁹ Moreover, contemporaneous evidence indicates that the profit split was not based on the question of control but instead reflected the crucial importance of the morning franchise. John Fontaine, a member of the Knight-Ridder Board and the corporation's General Counsel, wrote to Chapman on September 23, 1985

... we can make a persuasive argument that *over time* the morning paper will contribute more to the agency than the afternoon paper. The fallback position if we do not prevail on 50/50 might be to start below 50% (reflecting our greater current losses) with our share increasing over (for example) three years to 50%.²⁸⁰

C. The Terms of the JOA

136. The application filed by the Free Press and the News states that the JOA will become effective 10 days after approval by the Attorney General, and will have an initial term of 100 years.²⁸¹

²⁷⁹Chapman 1888-89. See also IX 265C-D, P-Q, S.

²⁸⁰AX 577B. See also IX 265H-"I" and IX 251A in which Nelson, the former publisher of the News, informed Neuharth that the morning market "had a far greater potential than the evening field". It should also be noted that Baseman did, in fact, take into account the control factor in estimating Gannett's perception of the Free Press's survival time. Baseman 3172-73.

²⁸¹NX C-2, Ex. 1, ¶ 1.2, 7.1.

137. The JOA contemplates that the Free Press will publish a Monday to Friday morning paper while the News will publish a Monday to Friday afternoon paper.²⁸² On Saturday and Sunday, only one paper will be published with each paper assuming separate editorial and news responsibilities.²⁸³

138. By the terms of the agreement, the News and editorial staffs of the two papers are to remain independent and neither party to the arrangement may influence or impair the independent news and editorial voice of the other party's newspaper. The agreement provides:

Preservation of the editorial independence of each newspaper is of the essence of this Agreement. To this end, the news and editorial material for the *Detroit Free Press* shall be gathered, prepared and laid out by DFP and the news and editorial material for *The Detroit News* shall be gathered, prepared and laid out by DNI. . . The DFP and DNI news and editorial staffs shall be independent and neither DFP, DNI nor the Agency shall seek to influence or to impair the independent news and editorial voice of any other party's newspaper. Without limiting the gene-

²⁸²NX C-2, Ex. 1, ¶ 2.1. The timetable was clarified by a letter agreement which provides that the News may make no home deliveries before 11:00 A.M. and street sales consistent with a press start of no earlier than 6:15 A.M. NX 841D.

²⁸³NX C-2, Ex. 1, ¶ 2.1. For the Saturday edition, the staff of the Free Press will prepare the "breaking-news" sections while the News's staff is given responsibility for the "feature-news" sections. These assignment are reversed for the Sunday edition. NX 841. Although this arrangement allocates some editorial judgment (see Lawrence 2980-81), the Ninth circuit in *Hearst* accepted the Attorney General's determination that publication of a single Sunday edition in Seattle (there, predominantly by the *Times* with the *Post-Intelligencer* allocated six pages of reportorial and editorial content) was consistent with the statutory requirement of maintaining separate and independent editorial and reportorial functions. *Hearst*, 704F.2d. at 482; *Recommended Decision of ALJ*, Dkt. 44-03-24-06, at 7 (January 14, 1986).

ality of the foregoing, DFP and DNI each shall have the exclusive right to determine the editorial format, dress, layout and news and feature content of its newspaper. . . All personnel responsible for the news and editorial content of the *Detroit Free Press* shall be employees of DFP and shall be subject to the discretion and authority of DFP, and all personnel responsible for the news and editorial content of *The Detroit News* shall be employees of DNI and shall be subject to the direction and authority of DNI.²⁸⁴

139. As for the non-editorial and non-reportorial aspects of the two papers, the agreement provides that the Free Press and the News will form a partnership, to be known as The Detroit News Agency ("Agency"), which will control all of the business, commercial, and production aspects of publishing including the establishment of circulation and advertising prices.²⁸⁵

140. The Agency is to be managed by a five-person management committee with three members appointed by the News and two by the Free Press. The management committee will act on all matters by majority vote of a quorum present, except for nine specified, "joint action" matters that will require approval by at least two of the News' appointees and both of the Free Press's appointees. These "joint action" matters include calls for large capital contributions and expenditures, any agreements between the Agency and the News or the Free Press, decreases in the frequency of agreed-upon cash distributions, disposition of Agency assets, incurrence of debt, adoption of or changes in accounting or tax practices, and changes in allocations of news content and use of color as well as alternations in format or structure of the weekend editions.²⁸⁶

²⁸⁴NX C-2, Ex. 1 ¶ 2.3.

²⁸⁵NX C-2, Ex. 1 ¶ 2.1.

²⁸⁶NX C-2, Ex. 1 ¶ 5.1.

141. The proposed arrangement further calls for the two newspapers to make capital contributions in equal amounts to the Agency. The arrangement provides that if one of the newspapers makes an initial capital contribution in an amount less than the other, then the party making the lower capital contribution is to make a cash payment to the Agency of an amount equal to its deficiency in capital. The initial capital contribution of the Free Press calculated as of the close of fiscal 1985 will be \$88,442,601 in property, plant, and equipment. The initial capital contribution of the News is placed at \$101,046,280. The Free Press thus will be required to make a payment in excess of \$12 million within a 10-day period following the effective date of the creation of the Agency.²⁸⁷

142. During the first three years of the arrangement, the Free Press is to receive 45% of the profits of the Agency while the News' share will be 55%. In the fourth year of the Agency, the Free Press will receive a 47% share and the News will receive a 53% share. The Free Press' share will increase to 49%, and the News' share will decline to 51%, in the fifth year of the Agency's operation. Beginning in the Agency's sixth year, profits and losses will be shared equally by the Free Press and the News.²⁸⁸

III.

DISCUSSION

Congress enacted the Newspaper Preservation Act, ("NPA"), Pub. L. 91-353, 84 Stat. 466, 15 U.S.C. §§ 1801-1804, on July 24, 1970. It reversed the Supreme Court's decision in *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969) (hereinafter "*Citizen Publishing*") which held that

²⁸⁷NX C-2, Ex. 1 ¶¶ 1.4-1.8.

²⁸⁸NX C-2, Ex. 1 ¶ 4.2.

a Joint Operating Agreement ("JOA") involving market allocation, price fixing, and profit sharing, between the two daily newspapers in Tucson, Arizona violated the Sherman Act because the newspapers failed to meet the stringent requirements of the "failing company" doctrine. As articulated in *Citizen Publishing*, the doctrine would only allow an antitrust exemption when the resources of one of the papers involved in a JOA are so depleted, and its prospects are so dim, that it cannot be resuscitated by some viable alternative including reorganization after bankruptcy or possible sale to a non-competitor.²⁸⁹

With the passage of NPA, a limited exemption from the antitrust laws (and specifically from the "failing company" doctrine of *Citizen Publishing*) was allowed for those future JOA's²⁹⁰ receiving the prior written approval of the Attorney General. NPA also provided a retroactive exemption without review to those arrangements already existing at the time of

²⁸⁹The rationale of the "failing company" doctrine was spelled out in *International Shoe Co. v. FTC*, 280 U.S. 291 (1930) in which the Supreme Court reasoned that a consolidation (there, a merger) between two competitors, one of which is failing, could have no adverse effect on competition because even if there were no merger the failing company would disappear as a competitive factor. The Court held, however, that before the "failing company" exemption could be invoked, the acquired firm must have been on the verge of liquidation with no alternative purchaser in sight.

²⁹⁰The term "joint newspaper operating arrangement" is broadly defined to include almost any form of arrangement or joint venture between two or more independently owned newspapers "pursuant to which joint or common production facilities are established or operated," provided that "there is no merger, combination, or amalgamation of editorial or reportorial staffs, and that editorial policies be independently determined." 15 U.S.C. § 1802(2).

enactment²⁹¹ if they met the statute's less stringent requirements for pre-1970 JOA's.²⁹²

For post-1970 JOA's, the Attorney General must make two findings before approval can be granted: first one of the newspapers must be "failing", defined as a paper "which, regardless of its ownership or affiliations, is in probable danger of financial failure"²⁹³; and second it must be determined that approval of the JOA would effectuate the policy and purpose off the statute, namely, to protect editorial and reportorial competition from the adverse consequences which presumably would follow if a newspaper fails commercially.²⁹⁴

In deciding whether the exemption applies here, I have looked to the following record facts:

1. The war between the Free Press and the News is not of recent vintage. It traces back to at least 1960.
2. The Detroit newspaper war entered a particularly severe phase in the 1970's, and continued unabated during a period when Detroit was facing a harsh economic environment.

²⁹¹At the time the Supreme Court decided *Citizen Publishing* in 1969, joint operating arrangements existed in 22 cities. Most of these involved provisions similar to those which the Supreme Court held unlawful.

²⁹²The Act exempts joint arrangements entered into before July 24, 1970, if, when first entered into, "not more than one of the newspaper publications involved in the performance of such arrangement was likely to remain or become a financially sound publication." 15 U.S.C. § 1803(a).

²⁹³15 U.S.C. § § 1802(5), 1803(b).

²⁹⁴The policy and purpose of the Act are found in 15 U.S.C. § 1801

In the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States, it is hereby declared to be the public policy of the United States to preserve the publication of newspapers in any city, community, or metropolitan area where a joint operating arrangement has been heretofore entered into because of economic distress or is hereafter effected in accordance with the provisions of this chapter.

3. In this latest phase of the struggle, both papers contemplated that the goals of market domination and future profitability were to be achieved at the expense of current profits since the costs associated with capital expenditures, promotions, and above all low circulation and advertising prices, would inevitably produce losses.

4. The strategies pursued by the Free Press and News — future domination and profitability at the cost of current profits — were perceived by management as economically rational given the history of the demise of junior papers which had entered the downward spiral. There is no convincing proof, however, that the economic conditions underlying this history — particularly the effects of scale economies — is applicable to these two large papers operating in the huge Detroit newspaper market.

5. At the time the JOA was negotiated, the News was leading in most circulation, revenue, and lineage measures of the rivalry between two competing metropolitan newspapers. It was not, however, in a clearly dominant position: the News was suffering deep losses of its own; the Free Press was in striking distance of the total circulation lead, which the News had only been able to hold by discounting its already low cover prices; and the News's advertising lead, which was also sustained by severe discounting, was vulnerable to a change in the circulation lead.

6. The Free Press was not in a downward spiral of inter-related circulation and advertising decline when the JOA was negotiated and it will not enter the downward spiral so long as Knight-Ridder remains in Detroit.

7. If the struggle continues, there is no convincing evidence that superior scale economies is likely to be determinative for the News.

8. If the struggle continues, there is no convincing evidence that the Free Press's advantages, including its morning franchise and its slightly superior geographic positioning and readership demographics, will assure profitability.

9. While there is little evidence that the Free Press vigorously pursued cost-cutting measures during its struggle with the News, there is even less in the record challenging the perception of Applicants' witnesses that, in fact, without a JOA there would be few real opportunities for such savings. In this connection, the reticence of Intervenor, the major newspaper unions, on the question of possible wage and job concessions — a crucial newspaper cost — is especially telling.

10. No accounting legerdemain created the Free Press's large operating losses, and no accounting sleight of hand (or resolution of quibbles about equity-debt conversions, management fees, taxloss carryovers, or amortization of expenses) can eliminate them.

11. The News's operating losses are almost as severe as the Free Press's and are attributable to the same causes — an attempt (in a depressed economic environment) by a deep-pocketed chain to achieve market domination and future profitability at the cost of current profits.

12. The objectives of dominance and future profitability were pursued by both papers (and their parents) in the belief that failure too had its reward in the form of JOA approval.

13. The negotiation of the JOA agreement also reflected the distaste of both Gannett and Knight-Ridder for head-to-head competition in which neither side could achieve profitability so long as the other persisted in following the goal of domination.

14. The filing of the JOA application adversely affected Free Press performance.

15. The JOA agreement is essentially a 50/50 profit split, and Applicants did little to disturb the careful analysis of Kenneth Baseman, the Antitrust division's retained expert, who demonstrated that this arrangement represents a perception by Gannett that there can be neither clear winner nor a clear loser for at least seven years.

16. On the is record, one cannot conclude that reader and advertiser demand in Detroit is so inadequate that the market cannot sustain two profitable papers irrespective of changes in pricing policies. On the contrary, most of the persuasive contemporaneous evidence indicates that at higher circulation and advertising prices, Detroit can sustain two profitable papers even at the current level of the city's economic performance.

17. Neither paper can achieve profitability (or survive indefinitely if viewed on a stand-alone units) so long as its parent-chain persists in its present strategy of sacrificing current profits for dominance and future profitability or a JOA; or, as one might expect, Detroit cannot sustain two profitable papers when both are practically being given away.

18. Since neither the Free Press nor the News can raise circulation or advertising prices without regard to what the other paper does, there is no completely unilateral course of action which either paper can pursue which would return it to profitability.

From all this, Intervenor and the antitrust Division contend, minimally, that the JOA application is premature, and before countenancing a 100-year departure from the competitive norm, the Attorney General should allow the free market time to work its will in the sense that in the absence of a JOA the Free Press (or the News) may modify its behavior, and follow a more profitable course of action in the

form of price increases, or the acceptance by one or the other of a less than dominant position in the Detroit market.

Applicants, on the other hand, argue that in the face of seven years of deep losses at the Free Press, all that the Intervenor and the Antitrust Division are really saying is that there is some likelihood of collusion, direct or indirect, which may raise prices to the point of profitability. Applicants then argue that it was not the intent of congress that the basic policy of NPA — to preserve distressed newspapers — should be subverted by resorting to this sort of speculation over possible parallel or interdependent pricing.

Both sides claim to find support for their arguments in the legislative history and the only post-1970 JOA case decided under NPA, *Committee For an Independent P-I v. Hearst Corp.*, 704 F.2d 467 (9th Cir.), *cert. denied*, 464 U.S. 892 (1983) (hereinafter "*Hearst*").

Looking first to the legislative history, it is readily apparent that in passing NPA, Congress had two purposes in mind: first to stop dead in its tracks any further application of the *Citizen Publishing* in extremis standard to existing JOA's²⁹⁵; and second to formulate for future JOA's a standard that was far more stringent than the test for existing JOA's but again less demanding than *Citizen Publishing*.²⁹⁶ Since we are here deal-

²⁹⁵See, e.g., S. Rep. No. 91-535, 91st Cong., 1st Sess. 4 (1969) ("The [Judiciary] Committee wishes to establish a less stringent test than that applied in the case of *Citizens Publishing Company*. . . ."); see also *Hearst*, 704F.2d 476.

²⁹⁶The various Senate bills made no distinction between existing and prospective JOA's in applying either the "not likely to remain or become financially sound" test or the "probable danger of failure" test. This approach was specifically rejected in the House (and in the final bill) in favor of applying the "probable danger" standard to prospective JOA's only and allowing for a less stringent test for existing JOA's. See *Hearst*, 704F.2d at 474, 477.

ing with a post-1970 JOA, the problem is to parse the meaning of "probable danger of failure" by determining what lies between the strict "grave probability of a business failure" standard of *Citizen Publishing* and the more lenient "[un]likely to remain or become a financially sound publication" standard of NPA for pre-1970 JOA's. From my reading of the legislative history, I have concluded that this area should be defined by evaluating the evidence respecting the existence of conditions leading to dominance and the downward spiral.

The significance of dominance and the downward spiral to the failing newspaper problem was plainly set out by Congressman Matsunaga, the principal sponsor and spokesman for 108 cosponsors of H.R. 279, which became the Newspaper Preservation Act. After describing the interrelationship between a decline in circulation and advertising, Congressman Matsunaga concluded that "The consequence is then a further decline in circulation with the almost irreversible downward spiral ending in a business failure."²⁹⁷ For pre-1970 JOA's, the legislative history strongly indicates that the exemption was to be invoked on the basis of an incipency rationale, a potential for a downward spiral as shown, for example, by losses and one paper moving into a lead over its competitor. This potentiality concept stood in marked contrast to the *Citizen Publishing* holding that there could be no exemption unless the downward spiral had progressed to the point that the JOA was the only alternative to liquidation. Again, Congressman Matsunaga speaking in defense of the pre-1970 "unlikely to remain or become financially sound" language, said —

²⁹⁷Hearings on H.R. 279 Before the Antitrust Subcomm. of the House Comm. on the Judiciary, 91st Cong. 1st Sess. at 10-11 (1969) [hereinafter, 1969 Hearings on H.R. 279].

Once a downward spiral, occasioned by the interrelationship of advertising, circulation and increasing costs, has led a newspaper to the crisis point demanded by the failing company doctrine, a competitor is likely to prefer the demise of the ailing newspaper to a cooperative arrangement that, if consummated at an earlier date, could have saved it not only as a commercial enterprise but more importantly, as an alternative independent editorial voice. Furthermore, the strict test of when a company is failing under the *International Shoe* and *Citizen Publishing* decisions is inappropriate in the newspaper industry because a severely financially threatened newspaper stands in jeopardy of losing its most valuable editorial and reportorial personnel to more stable competitors. It is doubtful that any remedial steps taken after loss of those highly skilled persons would be successful in restoring such a paper to its former editorial strength.²⁹⁸

There is surprisingly little, however, in the legislative history about what lies between the incipient or potentiality standard for pre-1970 JOA's and the insistence in *Citizen Publishing* on the death rattle at the end of total dominance and the downward spiral. While the meaning of the language used to describe this terrain — "probable danger" — was not extensively discussed, there are some clues in the legislative history as to its meaning. Thus we know for certain it does not mean a "grave probability" of either dominance or a downward spiral since "grave probability" was the standard of *Citizen Publishing* and there is not a hint in the legislative history that congress wanted any part of *Citizen Publishing* even for post-1970 JOA's.²⁹⁹ What the legislative history does suggest,

²⁹⁸1969 Hearings on H.R. 279 at 12.

²⁹⁹See, e.g., 1969 Hearings on H.R. 279 at 12 (statement of Cong. Matsunaga).

however, is that for these post-1970 JOA's, there must at least be convincing evidence of an irreversible economic condition that would produce domination and a downward spiral. I find some support for this conclusion from the fact that the "probable danger" language traces back to the Bank Merger Act of 1966 which just prior to congressional deliberations over NPA had been before the Supreme Court in *United States v. Third National Bank*, 300 U.S. 171 (1968).³⁰⁰ There the court had denied an exemption because the main reasons for the alleged failure — unsound loans and the inability of the failing bank to investigate credit risks properly — were due to managerial shortcomings which presumably could be overcome either by new management or by a change in the strategy of existing management. In other words, what was missing from *Third National Bank* was proof by the proponents of the exemption of some immutable economic condition that would defy some different management strategy. The legislative history also requires that the existence of such a condition should neither be lightly nor prematurely inferred.³⁰¹

I believe that this reading of the legislative history is consistent with *Hearst*. There the Ninth Circuit said that while operating losses alone were not determinative, the applicant would be afforded "failing newspaper" status on a record

³⁰⁰*Hearst*, 704F.2d 476. See also *Hearings on S.1520 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 91st Cong. 1st Sess. at 4, 9, (1969) (statements of Sen. Fong and Sen. Dirksen).

³⁰¹The very requirement in NPA for approval by the Attorney General was intended "to act as a brake upon other newspapers which might otherwise prematurely turn to joint operating arrangements, without testing other means of maintaining full commercial and editorial competition". 116, Part 2 *Cong. Rec.* 2006 (1970) (statement of Sen. Hruska).

which proved that 15 years of such losses were irreversible as shown by (a) the dominant position of the applicant's competitor; (b) a downward spiral of interacting circulation and revenue losses by applicant; and (c) the non-availability of viable alternatives including the existence of healthy aspects of the applicant newspaper that might profitably be exploited. *Hearst*, 704F.2d, 470, 479. Thus the plain meaning of *Hearst*, when taken together with the legislative history outlined above, is that for these post-1970 JOA's, the standard of NPA is not met if despite losses there is no convincing proof that the alleged failing paper is at least facing irreversible conditions which will lead to dominance and the downward spiral. In *Hearst* itself, market conditions had progressed to the point that one paper had already "attained" dominance while the other "had been caught in the phenomena that is called the 'downward spiral' in which a newspaper's declining circulation and lessening advertising revenue feed off one another, eventually forcing it to close." *Hearst*, 704F.2d at 471, 478.

Hearst, however, clearly does not say, as Intervenor intimates, that a JOA application may be approved when one of the papers is already in a downward spiral. To adopt this line of reasoning requires one to ignore the fact that in reversing *Citizen Publishing* Congress knew that the past history of the newspaper industry had shown that once clear market domination has been achieved and the junior paper was into the downward spiral, recovery was so unlikely that the prudent senior paper had little incentive to enter into a JOA because it needed only to wait for a natural monopoly to occur, a result which was clearly contrary to the public policy of NPA. *Hearst*, 704F.2d, 47374, 476.

As for Applicant's view of *Hearst*, it must be first noted that despite their insistence to the contrary, the *Hearst* requirement that there be a stand-alone evaluation of the Free

Press³⁰², cannot be transformed into a requirement that one must be oblivious to the obvious point that the Free Press's financial condition was traceable to the parent's strategy of seeking future domination and profitability (or a favorable JOA) at the expense of present profits. Even if this goal of domination was economically rational (that is, not indicative of mismanagement) I find nothing in the legislative history or *Hearst* which says that losses attributable to such a policy guarantees an exemption under NPA. While mismanagement or the use of creative bookkeeping by a parent to create the illusion of a failing subsidiary requires a denial of failing paper status, this does not mean that losses produced by competent management, irrespective of overall corporate policy, guarantees certain approval. To adopt such a line of reasoning would mean that any newspaper could engage in a whole panoply of risky strategies secure in the knowledge that the reward for failure — a JOA — may be just as valuable as, say, a successful attempt at monopolization. At most, I read NPA as being neutral on this point, neither penalizing nor rewarding firms determined to eliminate their competition.³⁰³

³⁰²The *Hearst* court concluded that the NPA language — "regardless of ownership and affiliation" — requires that the evaluation of the financial condition of a paper be made on a stand-alone basis since no assumption can be made that even the most deep-pocketed parent will continue to fund losses indefinitely. *Hearst*, 704F.2d 480-81.

³⁰³Whether this neutrality would extend to predatory pricing is an issue that does not have to be resolved here although the record at least suggests a scenario which would severely test the neutrality hypothesis. To illustrate, it was a close question as to whether the Free Press or News would be designated the "failing paper" for purposes of filing the JOA application. Finding 43. But the News's losses arose from such severe discounting that Gannett expressed concern over "the potential problem of illegal advertising contracts entered into by the News and their advertisers during their war for ad volume." AX 547.

The legislative history and *Hearst* are not neutral, however, on the requirement that the proponent of the JOA exemption has the burden of showing that losses (whether produced by the costly strategy of a deep-pocketed parent or otherwise) are traceable to an irreversible market condition which will probably lead to domination and the downward spiral. It is the existence of this immutable or irreversible condition which defines the area between the incipency standard for pre-NPA JOA's and the death rattle required by *Citizen Publishing*. If there is no convincing proof of the existence of such a condition, the application for an antitrust exemption should be denied.

Here, Applicants' economic expert, John Rosse, who had previously testified in practically all other litigated JOA cases about the crucial importance of the downward spiral as a reliable indicator of probable failure, acknowledged that there is no evidence in Detroit of this phenomenon. This gaping hole in Applicants' case was not filled by Rosse's subsequent explanation that only Knight-Ridder's largess has kept the Free Press out of the downward spiral. This opinion only begs the question of whether endemic to Detroit is an economic condition that will lead to dominance and a downward spiral. In other words, it neither adds nor subtracts from what the record plainly shows: that during a period of deep business recession if two strong-willed and deep-pocketed newspaper chains are bent on pursuing the costly goals of dominance and future profits (or a JOA) by charging the lowest circulation and advertising prices in the nation, the result, not surprisingly, is that both are going to ring up record losses. This does not constitute, however, proof that such losses are irreversible in the sense that because of scale economies the market is a natural monopoly which simply lacks the reader or advertiser base necessary to sustain two profitable papers irrespective of Free

Press or News strategies for achieving dominance.³⁰⁴ As it happens, not only is Applicants' evidence on scale economies weak, but the record shows that both the Free Press and the News have projected profitability at circulation and advertising prices which match those charged elsewhere. Moreover, the basic premise of the proposed JOA is that the two newspapers (through their so-called "Agency") will realize handsome profits from already planned price increases.

This is not to say that NPA requires proof from Applicant's that without a JOA it is a certainty that the Detroit market will inevitably produce one clear winner who sends a clearly defeated loser spinning out of control into a downward spiral. But, by the same token, since we are dealing with an antitrust exemption whose essential elements must be narrowly construed and established by the proponent (*Hearst*, 704F.2d 473, 478-79), Applicants should not be permitted to cover up their own glaring failure to prove the existence of an irreversible condition leading to a downward spiral by the expedient of a witness stand threat from the Knight-Ridder CEO that he will shut down the Free Press if the JOA is denied (all the pre-litigation evidence is to the contrary) or the warning by the Gannett CEO that in the face of certain losses, should he have to continue without a JOA, he will maintain current pricing practices (which requires acceptance of the odd notion that a rational and self-interested firm will persist in unprofitable behavior). As Applicants would have it, however, this testimony along with the evidence of operating losses somehow

³⁰⁴See e.g., 1969 *Hearings on H.R. 279* at 9 ("Where the context is one of increasingly high publishing costs and a limited market area, the theoretical constructs of competition may become unworkable") and at 15 ("The anti-trust laws cannot create commercial competition where the economics of the situation will just not allow for the continued operation by two totally competing papers") (statements of Cong. Matsunaga).

shifts the burden to the Intervenor and Antitrust Division to provide sure-fire proof that the Free Press and News will move independently to the higher prices that are not only indispensable to profitability without a JOA but are inevitable with a JOA. Such an allocation of proof would mean that the grant of a 100year exemption from the antitrust laws would turn on the ability of opponents to prove what the proponents may or may not do in the future.

The burden of proving all essential elements of the NPA exemption rests with the applicants at all times. 28 CFR § 48.10(a)(4). This burden is not met by witness stand declarations of company officers (or retained experts) respecting the future intentions of Gannett or Knight-Ridder. Once the issue is joined in litigation, statements about future intent lend themselves to being shaped by adversarial consideration. See, e.g., *United States v. Phillips Petroleum Company*, 367 F. Supp. 1226, 1238 (D.C. Calif. 1973). At most, this kind of evidence (whose "utility is sharply limited", *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 565 (1973) (concurring opinion of Mr. Justice Marshall)) must be weighed against the contemporaneous evidence. As I have indicated earlier, most of the persuasive contemporaneous evidence shows that Detroit was perceived by the Free Press and News as one of the richest, most attractive newspaper markets in the nation, and one which could sustain two profitable papers at higher circulation and advertising prices.³⁰⁵ This evidence, which at least strongly suggests that a city of Detroit's size is not a natural monopoly where scale economies dictate an irreversible economic condition that will lead to domination and a downward spiral, means that we never reach the question

³⁰⁵See Findings 10, 13, 98, 113.

of alternatives.³⁰⁶ Or to put it somewhat differently, the Intervenor and the Antitrust Division have no burden of showing how Knight-Ridder and Gannett if left to their own devices (that is, without the crutch of a JOA to lean on and based on their own perceptions of the worth of the Detroit market) will react and counterreact to each other's strengths, weaknesses, and strategies.

In sum, we know for certain that under the blanket of a JOA, both papers will settle back into the quiet life without any competition whatsoever. It remains to be seen whether without a JOA these interdependent firms will modify their competitive strategies in the face of the equally strong certainty that should present tactics persist the result will be continued losses for both. The point under NPA and *Hearst* is that unless the record shows an irreversible condition indicative of probable domination and a downward spiral, the resolution of this sensitive question of how the marketplace is going to behave and what it will eventually produce should be left, as it usually is, to the free market itself.

IV.

CONCLUSIONS

1. The losses incurred by the Free Press and the News are attributable to their strategies of seeking market dominance and future profitability at any cost along with the expectation

³⁰⁶In *Hearst* the question of alternative management strategies was considered only after it was demonstrated that "it was the economics of the newspaper industry, highlighted by the 'downward spiral effect which led to the P-I's failing financial health.'" *Hearst*, 704F.2d at 471. "After finding that the P-I's financial difficulties was irreversible, the ALJ then concluded that Hearst and the Times Company had met their burden of proving the P-I was in a state of 'probable financial failure'." *Ibid*.

that failure to achieve these goals would result in favorable consideration of a JOA application.

2. The Free Press is not dominated by the News.
3. The Free Press is not in a downward spiral.
4. Applicants failed to prove that there exists in Detroit an irreversible market condition that will probably lead to domination and the downward spiral.
5. In the absence of proof that it is confronted with actual or probable domination and a downward spiral, the Free Press does not qualify as a failing newspaper under the Newspaper Preservation Act.

V.

RECOMMENDED ORDER

The Administrative Law Judge recommends that the Attorney General issue the following order:

Upon consideration of all of the facts and applicable law, it is hereby ordered that the application by Detroit Free Press, Incorporated and the Detroit News, Inc., for approval of a joint operating arrangement pursuant to the Newspaper Preservation Act, 15 U.S.C. § 1801 *et seq.*, be, and the same is, hereby denied.

Respectfully submitted,

/s/ Morton Needelman
Morton Needelman
Administrative Law Judge

DATED: December 29, 1987

BEFORE THE
ATTORNEY GENERAL OF THE UNITED STATES

In the Matter of)	
)	
Application by Detroit Free Press,)	
Incorporated, and The Detroit)	
News, Inc.)	Docket No.
Approval of a Joint Newspaper)	44-03-24-8
Operating Arrangement Pursuant to)	
the Newspaper Preservation Act,)	
15 U.S.C. § § 1801, <i>et seq.</i> ,)	

Notice to Parties of Record

The enclosed sheet has been received from Administrative Law Judge Morton Needelman, and will be included in the record of the above entitled matter.

/s/ Janis A. Sposato
Janis A. Sposato
General Counsel
Justice Management Division
U.S. Department of Justice
Washington, D.C. 20530

February 10, 1988
Washington, D. 20015

February 2, 1988

Ms. Janis A. Sposato
General Counsel Justice Management Division
Room 6328
U.S. Department of Justice
10th and Constitution Avenue, N.W.
Washington, D.C. 20530

Re: Dkt. No. 44-03-24-8

Dear Ms. Sposato:

Please inform the Attorney General and the parties that my Recommended Decision in the Detroit JOA proceeding should be corrected as follows:

- p. 100, note 260, line one: "recounted" should be "recanted"
- p. 121, line nine: insert "only" after "may"

Sincerely,

/s/ Morton Needelman
Administrative Law Judge

BEFORE THE ATTORNEY GENERAL
OF THE UNITED STATES

In the Matter of:)

Application by Detroit Free Press,)
 Incorporated, and The Detroit News,)
 Inc., for Approval of a Joint)
 Newspaper Operating Arrangement)
 Pursuant to the Newspaper)
 Preservation Act, 15 U.S.C. §§ 1801,)
et seq.)

Docket No.
44-03-24-8

[August 8, 1988]

DECISION AND ORDER

Introduction

Under the Newspaper Preservation Act ("NPA"), 15 U.S.C. 1801 *et seq.*, the Attorney General of the United States has been given authority to grant a limited antitrust exemption for a joint operating arrangement ("JOA") between two newspapers, at least one of which has been demonstrated to be "failing." 15 U.S.C. 1803(b). The statute defines a "failing newspaper" to mean "a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure." 15 U.S.C. 1802(5). If that statutory condition is met, approval of a JOA is appropriate if such approval "would effectuate the policy and purpose" of the Act — identified by Congress as "maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States." 15 U.S.C. 1801. To this end, the JOA, while providing for joint or common production facilities, must

insure that separate editorial and reportorial staffs are maintained and that "the editorial policies [of the two newspapers are] * * * independently determined." 15 U.S.C. 1802(2).

On May 9, 1986, the *Detroit Free Press* (*Free Press*), which is published by Detroit Free Press, Inc., a wholly-owned subsidiary of Knight-Ridder, Inc., and *The Detroit News* (*News*), which is published by The Detroit News, Inc., a wholly-owned subsidiary of Gannett Co., Inc., filed an application for approval of a proposed JOA. The application sought to combine operation of the two Detroit daily newspapers, but on terms that insured the respective reportorial and editorial activities would remain separate and independent. The *Free Press* was identified as the paper in "probable danger of financial failure" within the meaning of the statute.

Following receipt from the Justice Department's Antitrust Division of its filing in opposition to the application, and the submission of a number of requests for intervention from others having an interest in the matter, I referred the application request to Administrative Law Judge Morton Needelman on February 25, 1987, with specific direction that the record be developed on seven factual questions concerning the financial status of the *Free Press*. See 28 C.F.R. 48.10. The major area newspaper unions and Mayor Coleman Young were allowed to intervene.

Over the ensuing months, an extensive record was developed that included documentary evidence, written and oral testimony, full opportunity for the applicants, interveners and the Antitrust Division, through their principals, witnesses and counsel, to be heard and to respond, and the submission by the parties of proposed findings and memoranda of law.

On December 29, 1987, Administrative Law Judge Needelman issued his Recommended Decision, together with

Findings and Conclusions, in which he recommended that the Detroit papers' application for a JOA be denied. Pointing to the aggressive market-domination strategies pursued by both the *Free Press* and the *News*, he observed: "It remains to be seen whether without a JOA these interdependent firms will modify their competitive strategies in the face of the equally strong certainty that should present tactics persist the result will be continued losses for both." ALJ Recommended Decision, at 126-27.¹

The Administrative Law Judge remained unconvinced by the insistence of both newspapers that, if the JOA option is removed, current market conditions make a change in either's pricing practices competitively unsound and thus not at all likely. He viewed the *Free Press* as (a) not dominated by its competitor, (b) not in a downward spiral, and (c) not confronted with "an irreversible market condition that will probably lead to domination and the downward spiral." ALJ at 128. On the strength of these conclusions, it was the view of the Administrative Law Judge that there was insufficient basis from which to conclude that the *Free Press* faces probable danger of financial failure.

With all respect to Judge Needelman, review of this extensive record leads me to the opposite conclusion.

Background

This is the fifth application for a joint operating arrangement filed with the Attorney General under the Newspaper Preser-

¹References hereafter to the Recommended Decision of the Administrative Law Judge will be to "ALJ at ____." If specific fact findings are mentioned they will be referred to throughout as "FF" followed by the number of the finding in question.

vation Act. Unlike the previous four, however, all of which were successful, the circumstances of this filing presents for the first time the application of the Act in a large metropolitan market where fierce competition between the two existing newspapers has left both with substantial and persistent operating losses.

Detroit is a highly prized \$300 million dollar market, the fifth largest in the United States (ALJ at 74 (FF 98)), and thus it comes as no surprise that it attracted the intense interest of the country's two largest newspaper groups, Gannett (which owns the *News*) and Knight-Ridder (which owns the *Free Press*). Competition between the two appears to have "entered a particularly severe phase in the [1970's]" when both papers adopted strategies aimed at achieving long-term market domination and future profitability at the expense of immediate or short-term profits. ALJ at 112.

Neither newspaper has prevailed, despite the sizeable expenditures in 1976 and again in 1985 by Knight-Ridder of investment capital on its press facilities to expand the *Free Press*' production capacity. ALJ at 18-19 (FF 19), at 28-29 (FF 33). Rather, as the Administrative Law Judge put it (ALJ at 123-24):

* * * during a period of deep business recession if two strong-willed and deep-pocketed newspaper chains are bent on pursuing the costly goals of dominance and future profits (or a JOA) by charging the lowest circulation and advertising prices in the nation, the result, not surprisingly, is that both are going to ring up record losses.

That is precisely what occurred in Detroit, throughout the decade of the 80's. Both the *Free Press* and the *News* suffered sizeable operating losses in their respective efforts to

increase circulation and advertising revenues without either moving toward a position of market dominance. ALJ at 63 (FF 83), and at 71 (FF 92). It is the case that the *Free Press*' losses outstripped those of the *News* in each of those years (*ibid.*), and that it consistently trailed the *News* in most circulation, revenue and lineage measures. ALJ at 113. But the pricing and discount strategies adopted and maintained by the *News* so as to retain its market position defeated all prospects for its achieving profitability as well. ALJ at 71-72 (FF 92, 94), 77 (FF 101), at 114.

The recognized market solution to this competitive stalemate was found by the Administrative Law Judge to exist in higher circulation and advertising prices. ALJ at 115. Projections by both the *Free Press* and the *News* confirmed that, all else remaining constant, each could achieve profitability with price increases and the elimination of discounting. ALJ at 84-87 (FF 113, 114). Nonetheless, as Administrative Law Judge Needelman found, "[s]ince neither the *Free Press* nor the *News* can raise circulation or advertising prices without regard to what the other paper does, there is no completely unilateral course of action which either paper can pursue which would return it to profitability." ALJ at 115.

Discussion

The filing of a JOA application offers a possible alternative means of restoring the two Detroit newspapers to a position of profitability without compromising the independence of their reportorial functions. In order for such an arrangement to be approved, however, it must be demonstrated that the *Free Press*, "regardless of its ownership or affiliations," is in "probable danger of financial failure" within the meaning of 15 U.S.C. 1802(5).

Traditionally, this "failing newspaper" test has been applied in a market setting where a demonstrably weaker newspaper is experiencing mutually reinforcing market trends of declining advertising revenues and circulation, creating a "downward spiral" phenomenon that in all probability cannot be reversed. No such description fits either newspaper here.

Nonetheless, the danger of financial failure claimed by the *Free Press* appears to every bit as real in Detroit. Notwithstanding Knight-Ridder's heavy capital investment in an attempt to expand circulation and increase advertising (ALJ at 18-19 and 28-29), and certain longer-term strategic strengths that the *Free Press* claims it enjoys as the morning newspaper (ALJ at 36-41), the *News* retains a sizeable advantage in advertising revenues, generating some \$61 million more than the *Free Press* in 1986. ALJ at 55-56 (FF 72); and see ALJ at 59-60 (FF 78). This advantage, juxtaposed against operating losses experienced by the *Free Press* each year since 1979, aggregating over \$81 million through 1986 (ALJ at 63), points in the direction of a "failing newspaper." If, as all seem to acknowledge (ALJ at 77 (FF 102)), the *Free Press* is unable unilaterally to restore the paper to a profitable position (ALJ at 81-82 (FF 110), 89 (FF 116), and at 115), and has no realistic prospect of outlasting the *News*, given the latter's substantial advertising and persistent circulation lead (ALJ at 113), the danger of financial failure, if not imminent, certainly seems "probable."

In the Seattle JOA case, Attorney General Smith construed the Newspaper Preservation Act as follows: "It is apparent from the express language of the statute that 'failing newspaper' analysis under the Act must focus upon the financial condition of the particular publication at issue, and that, 'danger of financial failure' must be addressed as a matter of probabilities, not certainties." Seattle Decision, 47 Fed. Reg.

26473 (1982). Reviewing the Attorney General's decision, the Ninth Circuit in *Committee for an Independent P-I v. Hearst Corp.*, 704 F.2d 467 (9th Cir. 1983), determined under a "commonsense construction" of the Act that "[t]he probable danger standard is, by the plain meaning of the words, primarily an economic standard: Is the newspaper suffering losses which more than likely cannot be reversed?" 704 F.2d at 478.

Proof of this condition requires something less than the stringent judicially created "failing company" standard used by the Supreme Court in *Citizen Publishing Co. v. United States*, 394 U.S. 311 (1969),² but more than the "not likely to remain or become financially sound" definition used in the rejected Senate version of the Act. See *Hearst*, 704 F.2d at 474.

The position of the *Free Press* appears to find this middle ground. It plainly does not face external market forces - such as rising costs, competition from other media outlets and the siphoning off of readers from the metropolitan region to the suburbs - that would portend almost uncertain failure. Nor, as earlier indicated, do there exist marketplace declines in overall advertising and newspaper circulation in Detroit of the sort that traditionally propel a junior newspaper into the proverbial "downward spiral" that is fatal to survival.

At the same time, it is unquestionably the case that the *Free Press* is locked into a loss situation involving millions of dollars each year for the foreseeable future, with no realistic prospect of extricating itself (ALJ at 113). Indeed, were it not for a major infusion of millions of dollars by its parent, there is every reason

²Under *Citizen Publishing*, a "failing company" had to be on the brink of collapse, its prospects for reorganization dim or non-existent, and without any prospective non-competitive buyers before a JOA could be approved.

to assume that the *Free Press* would have failed long ago. ALJ at 70 (FF 91). Yet, KnightRidder invested substantial sums of money and resources on the gamble that in time the *Free Press* could gain market domination and become a profitable enterprise. Notably, this strategy did not contemplate that Detroit would continue with two profitable newspapers, only one. ALJ at 25-26 (FF 30, 31), and at 111-112. Knight-Ridder's counterpart, Gannett, embarked on its own market-domination strategy for the *News* with the same objective in mind. ALJ at 21 (FF 23), and at 111-112. Both have been frustrated. ALJ at 100 (FF 130).³

The argument is made that both papers should raise prices and discontinue advertising discounts. But the *Free Press* is currently selling its daily copy at 5 cents above the *News* and it offers a smaller discount rate. ALJ at 75 (FF99), 77 (FF 101). There is thus no competitive advantage to be gained by Knight-Ridder from a unilateral increase in prices (ALJ at 81-82 (FF 110)); that market move must be accompanied by parallel price increases (and discount reductions) at the *News* if the papers have any chance of becoming profitable (ALJ at 87 (FF 115)).

Gannett has made clear that it has no intention of embarking on such a course, either unilaterally or in conjunction with Knight-Ridder. ALJ at 80 (FF 107). While the Administrative Law Judge questioned the testimony of Gannett officials to this effect (*ibid.*), it hardly reflects unsound business judgment to retain awhile longer the *News*' current depressed pricing

³It is the case, as the Administrative Law Judge found (ALJ at 84 (FF 113), 87 (FF 115), and at 115, that the Detroit market *could* sustain two profitable newspapers *if* both circulation and advertising prices were increased. Nonetheless, both Knight Ridder and Gannett have elected to forego sharing the prize, resisting price increases in an effort to gain market dominance. ALJ at 19-21 (FF 21-23).

practices with so many indications that the *Free Press* and Knight-Ridder have abandoned all hope of market domination.

This is not to suggest that undue weight attach to the testimony of Knight-Ridder's CEO, who promised to recommend a closing of the *Free Press* if the JOA application is disapproved. ALJ at 93-95 (FF 124). Yet that prediction cannot be wholly disregarded. It would be neither counterintuitive nor contradictory for Knight-Ridder to follow just such a course upon concluding, after all these years, that the *Free Press* no longer had long-term prospects for market domination nor a more immediate opportunity through unilateral action to reverse its string of annual operating losses.

That is, after all, the market reality in Detroit under present circumstances. It is the condition that leads me to conclude that the "danger of financial failure" of the *Free Press* is not just speculative, or likely, but indeed "probable." And it is certainly the case that such a prospect for the newspaper pertains "regardless of its ownership or affiliations." Indeed, it appears at this stage that Knight-Ridder can, at best, only forestall the financial failure of the paper, not prevent it altogether.⁴ Yet, modest delay, particularly if associated with additional operating losses, does not alter the "probable danger of financial failure" determination.

There remains, of course, the additional question whether a decision favoring the proposed JOA will "effectuate the policy and purpose" of the Act. 15 U.S.C. 1801. I believe it will.

Undergirding the Act are two overarching policy objectives: the more general pro-competitive objective of the antitrust laws, and the specific objective of preserving "editorially and reportorially independent and competitive" newspapers (15 U.S.C. 1801). Congress recognized that neither of these purposes is advanced when a single newspaper obtains a monopoly

in any given market. The alternative of a JOA is in the nature of a legislative trade-off: an incremental elimination of competition as to the newspapers' production activities in exchange for the assurance that the existing array of editorial and reporting voices will remain fiercely competitive and independent.

As discussed above, the *Free Press* has satisfactorily demonstrated that the danger of financial failure has moved well within the zone of "probability", and that no unilateral actions on its part can, without entirely improper collusion or collaboration with the *News*, reverse the unbroken pattern of annual operating losses. To stand by and watch the paper's demise would poorly serve the Act's policy disfavoring a newspaper monopoly in the City of Detroit. As the Administrative Law Judge found, this is not a situation where the *Free Press* has brought itself to the brink of financial failure through improper marketing practices or culpable mismanagement (ALJ at 114). See also *Seattle Attorney General Decision*, 47 Fed. Reg. at 26474. Keen competition aimed at market domination and future profitability — competition waged energetically but both responsibly and properly — has moved both newspapers into intractable loss positions from which only one, the *News*, now appears to have any reasonable prospect of emerging.

Faced with this stark reality, both Gannett and Knight-Ridder understandably looked to the alternative of a JOA as a means of retaining their separate and independent editorial voices. Congress opened the door to just this sort of response with passage of the Newspaper Preservation Act. Some have argued that, because the two papers openly pursued the JOA option over several years and saw it as a means of avoiding financial failure (ALJ at 34 (FF 44), and at 114), they should not be permitted to enter into such an arrangement. The suggestion is that the prospect of a JOA, not competition for

market domination, was responsible most recently for the papers' reluctance to increase prices and eliminate discounting. See ALJ at 21 (FF 24), and at 114.

The evidence of record offers a much different picture, however. It makes abundantly clear that the strategy followed by both papers has been in place for nearly a decade (ALJ at 18-21 (FF 18-23)), and the heavy expenditure of investment capital by Knight-Ridder over that period of time belies the notion that it was principally pursuing any end other than market domination. ALJ at 23-29 (FF 26-33). With the objective no longer within the grasp of either paper, recognition of the JOA as an available option, and the commencement of negotiations on such an arrangement, signals prudent management judgment. Certainly, newspapers cannot be faulted for considering and acting upon an alternative that Congress has created.

Here, approval of the JOA will plainly further the legislative purpose of preserving editorial voices in Detroit — an outcome that does not appear to be in the future otherwise. Perhaps it can be said that Congress failed to focus at the time of the statute's enactment on the particular situation confronting the *Free Press* and the *News*. Its frame of reference essentially embraced the scenario of a strong newspaper poised to drive from the market a weaker competitor experiencing the "downward spiral" phenomenon due to external market forces. But no less destructive of the dual objectives of preserving open competition and vigorous editorial debate is the financial failure of one of two newspapers that has been locked for almost a decade in a severely competitive struggle for market domination and suffered irreversible operating losses year after year. If a JOA provides an acceptable means of avoiding the monopoly market anticipated in the former situation, so, too, does its approval serve to "effectuate the policy and purpose"

of the Act when confronted with the near certain newspaper monopoly that will result in the latter circumstance.

Conclusion

Accordingly, on the basis of my review of the entire record before the Administrative Law Judge, the Recommended Decision, including its many findings and conclusions, and the responses thereto filed by the parties and interveners, I conclude that the proposed JOA of the applicants, the *Detroit News* and the *Detroit Free Press*, should be approved. In so concluding, I have accepted as accurate the fact findings of the Administrative Law Judge, but differed for the reasons stated with his ultimate conclusion as to where those facts lead.

For me, the continuing and persistent operating losses suffered by the *Free Press* over the course of nearly a decade, with no prospect of unilaterally reversing that economic condition in the foreseeable future, describes a newspaper "in danger of financial failure." Because its competitor leads in virtually all economic indices, is prepared (indeed committed) to continue its depressed pricing practices at levels below the *Free Press* in order to insure that the *News* maintains its circulation and advertising advantages, and undoubtedly has the ability on such terms to outlast the *Free Press*, the very real potential for failure becomes highly "probable."

That prospect satisfies the statutory standard permitting a limited exemption from the antitrust laws. In such circumstances, approval of the JOA well serves the policy and purpose of the Act.

Dated: August 8, 1988

/s/ Edwin Meese III
EDWIN MEESE III
Attorney General

Order

Upon consideration of the entire record and the applicable law, it is here by ordered that the Application by the *Detroit Free Press* and the *Detroit News* for approval of a Joint Operating Arrangement pursuant to the Newspaper Preservation Act, 15 U.S.C.1801 *et seq.* is approved, said approval to become effective on the tenth day after the filing of this decision.

Dated: August 8, 1988.

/s/ *Edwin Meese III*
EDWIN MEESE III
Attorney General

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MICHIGAN CITIZENS FOR AN
INDEPENDENT PRESS, *et al.*,

Plaintiffs,

v.

Civil Action No. 88-2322

ATTORNEY GENERAL OF THE
UNITED STATES, *et al.*,

[September 14, 1988]

Defendants.

MEMORANDUM OPINION AND ORDER

This case is a challenge to a decision by former Attorney General Edwin Meese III to approve a joint operating agreement ("JOA") under the Newspaper Preservation Act ("NPA") of 1970, 15 U.S.C. §§ 1801-1804 (1982). The JOA would give the newspapers, the *Detroit Free Press* ("Free Press") and *The Detroit News* ("News"), limited exemption from antitrust laws.

Attorney General Meese granted the application for a JOA between the two newspapers on August 8, 1988. Eight days later, and two days before the JOA was to begin in operation, this suit was filed by plaintiffs, a group that includes individuals, advertisers, and newspaper employees who allege that they would be adversely affected by the JOA. On August 17, 1988, Judge Joyce Hens Green of this Court, sitting as motions judge, granted plaintiffs' motion to stay the effect of the Attorney General's decision until September 17, 1988. Judge Green held that "at this early stage of these proceedings the record sug-

gests the conclusion that the Attorney General's Decision and Order was arbitrary and capricious," but that "[u]pon a full ventilation of these matters a different conclusion might be reached." Opinion and Order Granting Stay at 15.

Pursuant to a schedule ordered by Judge Green, oral argument was heard on cross-motions for summary judgment on September 8, 1988. For the reasons stated herein, the Court grants defendants' motion for plenary summary judgment and will allow the stay to expire.

I. Background

The Detroit metropolitan area is the only urban center in the nation, save New York, with two general interest daily newspapers with circulations of more than 650,000 each. The Free Press, owned since 1940 by Knight-Ridder, Inc., the nation's second-largest newspaper group, and the News, run since 1986 by Gannett Co., Inc., America's largest newspaper organization, have engaged since roughly 1960 in what has been nicknamed "The Great Newspaper War." Unlike the numerous other news-print battles in American cities since World War II, however, the Detroit contest has not resulted in a clear winner and a clear loser. Indeed, since 1970 the Free Press has never captured less than 47 percent nor greater than 50 percent of the combined daily circulation market. By virtue of the newspaper war, the papers are the least expensive major dailies in the nation, both for buyers and advertisers, and Detroit has the highest per capita newspaper readership rate of any major metropolitan area.

By 1980, however, the management of each paper was deeply concerned that their publication would fall behind and suffer the fate of many other once-robust but now-extinct "second" newspapers. With each paper convinced that its publica-

tion could be the one to survive, each engaged in costly strategies to try to achieve "market domination." Each cut prices, discounted its advertising rates, and made significant capital investments, including the opening of a new printing plant by the Free Press in 1986.

Despite consistent profits during the 1970s, both publications have suffered operating losses throughout the 1980s, although those of the Free Press have been more consistent. On May 9, 1986, not long after Gannett purchased the News, the two newspapers petitioned the Attorney General for permission to work under a JOA, which includes a provision for only one newspaper to be published on weekends. Since then, the Free Press's losses have deepened, so that the paper now contends it is losing between \$34,000 and \$45,000 a day, even though circulation has not fallen off significantly.

After receiving the application for the JOA, the Attorney General in Charge of the Antitrust Division, then Douglas H. Ginsburg, who recommended on July 23, 1986 both that the application be denied and that the matter be presented to an administrative law judge ("ALJ"). Pursuant to 28 C.F.R. § 48.10 (1986), the Attorney General referred the matter to ALJ Morton Needelman, who conducted three weeks of evidentiary hearings. On December 29, 1987, Judge Needelman presented a 129-page Recommended Decision ("Recommended Decision") that including exhaustive findings of fact and again recommended that the JOA be denied. Attorney General Meese on August 8, 1988 issued a Decision and Order ("Decision and Order") granting the application for a JOA. Although he "accepted as accurate the fact findings of the Administrative Law Judge," Attorney General Meese "differed ... with his ultimate conclusion as to where those facts lead." Decision and Order at 14. Judge Green's order stayed the effect of the Attorney General's Decision and

Order, which otherwise would have permitted the JOA to go into effect under the NPA on August 18, 1988.

II. *The Newspaper Preservation Act*

Concerned over the failing of many "second" newspapers in major metropolitan areas in the 1950s and 1960s, Congress in 1970 enacted the Newspaper Preservation Act ("NPA"), 15 U.S.C. §§ 1801-1804 (1982). The NPA grants a partial antitrust exemption to newspapers that enter into a JOA, in which the newspapers that enter into a JOA, in which the newspapers merge their business operations and jointly set prices and advertising rates. At the same time, the editorial and reporting functions remain separate, so that two different newspapers, presumably with two fairly separate editorial voices, continue to be published.

The key requirement for the Attorney General's approval of a JOA is that one of the papers be a "failing newspaper," defined as a publication that, "regardless of its ownership or affiliations, is in *probable danger of financial failure*." 15 U.S.C. § 1802(5) (emphasis added). The "failing newspaper" test was clearly intended to replace the more stringent "failing company" defense for mergers generally permitted under antitrust law. Specifically, Congress wished to reverse the effects of *Citizen Publishing Co. v. United States*, 394 U.S. 131, 89 St.Ct. 927, 22 L.Ed.2d 148 (1969), in which the United States Supreme Court held that JOAs violated antitrust restrictions unless one publication was "on the verge of going out of business." *Id.* at 137, 89 S.Ct. at 930. The purpose of the NPA is to allow the partial merger of two newspapers before the failing one becomes too ill to revive. In the application for the Detroit JOA, the Free Press was offered as the "failing newspaper."

Under the NPA, a JOA with an antitrust exemption must get prior approval of the Attorney General, who may approve the JOA if "approval of such arrangement would effectuate the policy and purpose" of the act. 15 U.S.C. § 1803(b). The statute offers no further guidance to this broad latitude granted to the Attorney General; instead, the Department of Justice ("DOJ") has adopted rules to govern consideration of JOA applications. 28 C.F.R. pt. 48 (1987). The rules include provision for an administrative law judge ("ALJ") to make "recommendation" to the Attorney General. 28 C.F.R. § 48.10(d).

III. *Judicial Review*

Plaintiffs receive judicial review of the Attorney General's decision under the Administrative Procedure Act ("APA"), which directs the reviewing court to set aside agency action and conclusions when, among other situations, they are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The court may set aside agency action because it is "unsupported by substantial evidence" only in a case "reviewed on the record of an agency hearing *provided by statute*." *Id.* § 706(2)(E) (emphasis added). Since the NPA, does not provide for a hearing, only the "arbitrary" or "capricious" test is applicable here. *See, e.g., Camp v. Pitts*, 411 U.S. 138, 140-41, 93 S.Ct. 1241, 1243, 36 L.Ed.2d 106 (1973) ("substantial evidence" test not used when a hearing is held pursuant only to agency regulations); *Maryland Department of Human Resources v. Department of Health and Human Services*, 763 F.2d 1441, 1451 n. 7 (D.C.Cir.1985).

This Court takes the words "arbitrary" and "capricious" seriously, noting that they constitute a highly deferential standard of review that presumes the validity of authorized action

and requires affirmance if the action is supported by a rational basis. See, e.g., *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414-21, 91 S.Ct. 814, 822-26, 28 L.Ed.2d 136 (1971). Moreover, although this Court must give a thorough examination to the reasons and the record, the Court is *not* entitled to substitute its judgment for that of the authorized official, even if the Court would have decided the other way under a weight of the evidence standard. See, e.g., *Overton Park*, 401 U.S. at 416, 91 S.Ct. at 823. Finally, the Court is mindful of the fact that the plaintiff has the burden of proving that the Attorney General's action fails under this standard.

IV. Applying the Arbitrary and Capricious Standard

Plaintiff's contention that the Attorney General's decision was arbitrary and capricious consists of three broad arguments. First, plaintiffs argue that the Attorney General was unreasonable in finding that the Free Press is a "failing newspaper" under the requirements of the NPA. Second, plaintiffs allege that the Attorney General was not entitled to give any substantial weight to crucial testimony supporting the notion that the Free Press was in imminent danger of failure. Third, plaintiffs maintain that the Free Press and the News cannot be allowed to take advantage of a JOA since the business strategies of the applicants have been in part improperly guided by the prospect of a JOA. Finally, plaintiffs also contend that there were improper ex parte contracts by defendants during the Attorney General's consideration of this matter. Plaintiffs' contentions fail on all four points.

1. The Failing Newspaper Standard

The plaintiffs' first argument challenges the Attorney General's finding that the Free Press is in "probable danger of financial failure," the test for a failing newspaper under the NPA. Plaintiffs maintain that the newspaper is not "failing," citing uncontested findings of the ALJ that the Free Press is not dominated by the News, that the Free Press is not in a "downward spiral" of circulation and advertising revenue, and that both the Free Press and the News theoretically could be profitable with higher circulation and advertising process. The Attorney General admitted that the Free Press does not meet the traditional scenario of a downward-spiraling failing newspaper, but concluded nonetheless that "the danger of financial failure claimed by the *Free Press* appears to be every bit as real" as if it were following the traditional scenario. Decision and Order at 6.

This Court cannot hold that the Attorney General was arbitrary and capricious in finding that the traditional downward spiral, although a common symptom of a "failing newspaper," is not necessary to prove a "failing newspaper." This Court keeps in mind that a reviewing Court must grant considerable deference to the interpretation and construction of a statute by the official authorized to administer it, even if there are more than one possible interpretation or construction. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44, 104 S.Ct. 2778, 2781-83, 81 L.Ed.2d 694 (1984). Moreover, the Attorney General's position here is bolstered by the NPA's stated policy to "preserve [through JOAs] the publication of newspapers" that would otherwise fail. 15 U.S.C. § 1801 (1982). It would make little sense to hold that a newspaper should be denied a JOA and forced to close because of financial reasons simply because the publication had not entered a stereotypical "downward spiral."

The "failing newspaper" test must be, as the Attorney General noted, a matter of probabilities, not certainties. Indeed, the only appellate case construing the test held that the "probable danger" standard is, "by the plain meaning of its words, primarily an economic standard: Is the newspaper suffering losses which more than likely cannot be reversed?" *Committee for an Independent P-I v. Hearst Corp.*, 704 F.2d 467, 478 (9th Cir.) (approving the Attorney General's decision to grant a JOA in Seattle), *cert. denied*, 464 U.S. 892, 104 S.Ct. 236, 78 L.Ed.2d 228 (1983).

The Attorney General presented ample support, under the arbitrary and capricious standard, for his finding that the Free Press is both "suffering losses which more than likely cannot be reversed" and is in "probable danger of financial failure." The ALJ found, and the Attorney General noted, that the Free Press has suffered at least \$56 million in operating losses since 1980 (losses that have accelerated nearly every year), that there is *no* unilateral policy available that could extricate the Free Press from its loss situation, and that were it not for massive infusions of funds from its parent, Knight-Ridder, the Free Press would likely already have failed. The NPA instructs the Attorney General to consider the financial condition of the newspaper "regardless of ownership"—an order to view the newspaper as "a free-standing entity, as if it were not owned by a corporate parent." *Hearst*, 704 F.2d at 480. Since it is not disputed that the Free Press is caught in a serious loss position, with no unilateral way out, the Attorney General had sufficient support, under the "arbitrary" or "capricious" test, for his conclusion that the Free Press is in "probable danger of financial failure."

Plaintiffs rest their argument here on the prediction of the ALJ that if the JOA is denied, the News, which is also suffering losses, will raise its prices, the Free Press will quickly

follow, and both will once again bask in the sun of profitability. Plaintiffs also cite approvingly the findings of the ALJ about the long-term advantages of the Free Press and the consistent optimism of the Free Press management in the years before the JOA application was filed. Furthermore, plaintiffs argue, with some support from the ALJ, that the current losses of the Free Press are best characterized as a capital investment designed to reap future profits, should the Free Press become dominant.

These predictions about a bright future, however, must be tempered by three crucial points. First, the Attorney General was not unreasonable in concluding that there is no reason to expect the News to raise its prices any time soon, considering that such a move would put at risk its narrow circulation advantage, which in turn could jeopardize its position as the financially healthier Detroit daily, and considering that the management of the News has stated that it has no intention of raising prices. Second, the ALJ's long-term speculation comes with no timetable and no guarantee of probability, and does nothing to change the Free Press's *current* status as in "probable danger of financial failure." A company may have decent long-term prospects and still fail, either because the long-term prospects are too uncertain or remote, or because short-term losses are too severe to continue to suffer. The NPA does not require that a newspaper publisher suffer massive losses by keeping the publication in business during unprofitable years simply because of the prospect of the future profitability. Third, even if the Free Press did make a significant capital expenditures in the hope of future profits, this fact does not prevent it from becoming a "failing newspaper" if the losses proved to be longer-lasting or more severe than anticipated, or if the hope for future profits now appears to be unwarranted. Indeed, even if the ALJ stated that the Free Press is stuck in a deficit position and that there is no unilateral

strategy it could follow to extricate itself. Accordingly, this Court finds that the Attorney General was not arbitrary and capricious in concluding that the Free Press is a "failing newspaper."

2. The Disputed Testimony

Although the current financial situation of the Free Press is adequate to support the Attorney General's conclusion, plaintiffs complain that the Attorney General improperly credited a crucial portion of the testimony before the ALJ of Alvah Chapman, Jr., chief executive officer of Knight-Ridder, Inc., parent of the Free Press. Mr. Chapman testified that he would recommend closing the newspaper if the JOA were not granted. Calling it a "bolt out of the blue," the ALJ discounted the testimony entirely, apparently viewing it as simply a strategic maneuver and a "threat," because there were no previous indications that the Free Press would follow such a drastic path. Recommended Decision at 93-94. The Attorney General disagreed with the ALJ's assessment, stating that it would be "neither counter intuitive nor contradictory for Knight-Ridder to follow such a course." Decision and Order at 10.

Testimony such as this is always problematic, as there is a great incentive to provide self-serving evidence. Were it clear that this testimony were a "bluff," the Attorney General should have discounted it accordingly. If the threat is real, however, the proper positions of the Attorney General and of the reviewing Court are not so clear, even if the decision to close the Free Press were made in hopes of swaying the JOA decision. On the one hand, the government should discourage potential manipulative decisionmaking on the part of newspaper publishers. On the other hand, a publisher can close its newspaper whenever it chooses— whether it is

justified in doing so because of financial losses, whether it does so because its "bluff" is called and it wants to preserve its credibility, or whether it is propelled *both by the pain of losses and the potential pleasure of JOA profits*.

In the instant case, fortunately, the Court does not need to grapple fully with these problems. The Attorney General concluded that the testimony should not be disregarded entirely— a conclusion bolstered by the undeniable fact of massive losses from which the Free Press cannot extricate itself unilaterally, and by the stake of Knight-Ridder, Inc., the nation's second-largest newspaper company, in its credibility and reputation. Even if the assessment of the ALJ were also reasonable, this Court cannot find that the Attorney General's decision to give at least some weight to the testimony of Knight-Ridder's CEO was unreasonable, arbitrary, or capricious.

3. The Motivations of the Newspapers

The third major argument of plaintiffs is that the JOA must be denied because the losses suffered by the Free Press are in part the result of a conscious strategy of forcing prices so low that it would either drive its competitor out of business or cause losses that would permit a JOA. Both the policy behind the NPA and the *Hearst* opinion justify the notion that purposely incurred losses should not be recognized in justifying a "failing newspaper." See *Hearst*, 704 F.2d at 478. Indeed, whenever government offers a benefit because of financial hardship—be it welfare applicant or failing newspaper—there is always an incentive for the potential recipient to either exaggerate or exacerbate its woes in order to receive the benefit.

Here, there is no dispute that the losses of the Free Press are real, nor that they have been incurred primarily as the

result of a bold strategy that the publication hoped would lead it to a dominant position in the Detroit market. Rather, the contention is more subtle; the suggestion of the ALJ was that both newspapers felt free to adopt bold strategies of price-cutting in an effort to gain market domination because they were secure in the belief that "failure too had its reward in the form of JOA approval." Recommended Decision at 114, 128.

The Attorney General's response to this allegation was disconcerting, in that it failed to address the subtlety of the dual motive issue. Rather, the Attorney General set up what amounts to a straw man by stating incompletely that the "suggestion is that the prospect of a JOA, not competition for market domination, was responsible" for the newspapers' current strategies. Decision and Order at 13. He then concluded that the record "makes abundantly clear that the strategy followed by both papers has been in place for nearly a decade, and the heavy expenditure of investment capital by Knight-Ridder over that period of time belies the notion that it was principally pursuing any end other than market domination." *Id.* (citation omitted). Unless the word "principally" implicitly recognizes the dual motive argument, the Attorney General failed to address directly a key concern of both the ALJ and the chief of the Justice Department's Antitrust Division.

Nevertheless, this reviewing Court cannot conclude that the Attorney General, who is granted broad latitude under the NPA to effectuate the "policy and purpose" of the act, was arbitrary or capricious in finding that the Free Press's conduct did not disqualify it from a JOA. The ALJ's evidence shows that the prospect of a JOA played at most a secondary or supporting role in the newspapers' motivations. The Court believes that the policies behind the NPA would be best fulfilled by allowing a JOA when the newspaper's losses are *primarily*

the result of acceptable, competitive strategies, and are only marginally prompted by the prospect of a JOA should the strategies fail.

On one hand, newspapers should not be allowed, to quote the ALJ, to "engage in a whole panoply of risky strategies secure in the knowledge that the reward for failure—a JOA—may be just as valuable as, say, a successful attempt at monopolization." Recommended Decision at 122. On the other hand, the policies behind the NPA—saving newspapers that are failing after a goodfaith effort to keep them afloat—would *not* be fulfilled if a newspaper were forced to fail, without a JOA, when the predominant impetus behind the newspaper's strategy has been competition. It could be argued that this Court's policy may encourage "gambling" by newspapers in the future, but it will permit JOAs in situations where a city might otherwise lose a newspaper entirely.

In the Detroit case, the ALJ's findings, on which plaintiffs rely completely, show only a secondary role for the prospect of a JOA in the Free Press's strategic decisionmaking. Indeed, they suggest that the newspaper may have followed the same strategies had the JOA not been available. Considering this record, this Court cannot conclude that the Attorney General was arbitrary or capricious in finding that the newspaper's behavior was acceptable enough to qualify it for a JOA.

Finally, plaintiffs argue that the Attorney General's decision was fatally flawed because it was "internally inconsistent" in purporting to both accept the fact findings of the ALJ and disagree with the ALJ's findings about the newspapers' strategic motivations. This argument fails for two reasons. First, it is not clear that the Attorney General disagreed with the ALJ's fact findings as much as his inferences derived from facts. Second, since the Attorney General makes clear his view

that the newspapers were not engaged "principally" in ends other than competitive ones, the Court cannot fault him for a blanket phrase in his conclusion—not in his discussion—that he accepted the findings of fact. To overturn the Attorney General on this point would be review by semantic technicality.

4. Ex Parte Contacts

In their complaint, plaintiffs allege that the Attorney General was a target of unlawful ex parte contacts while he was considering the JOA application. Specifically, the plaintiffs contend that numerous letters were sent to the Attorney General, that the Attorney General discussed the JOA application at a meeting with a group of congressmen on June 7, 1988, and that the defendant publications engaged in a "public relations" campaign to achieve their goal of a JOA. In a signed declaration, former Attorney General Meese has rebutted each of these allegations first, he states that the Justice Department kept all ex parte letters away from him; second, he states that he refused to discuss the merits of the case at the June 7 meeting; third, he states that he never discussed the JOA with anyone outside of the Justice Department. As plaintiffs failed to add anything to their bald allegations in their motion for summary judgment and subsequent filings, the Court must grant defendants summary judgment on the ex parte issue.

V. Conclusion

It is not the duty of this Court to weigh the arguments of the ALJ in this matter against those of the Attorney General; the only authorized role for this Court under the NPA and APA is to determine whether the Attorney General's conclusions were arbitrary or capricious, using the ALJ's findings as a background record. The Court finds that the Attorney General

was not unreasonable in finding that the Free Press — a newspaper that has incurred, and will continue to incur, losses that would already have led to its demise were it not owned by large corporate parent — is a "failing newspaper," using the NPA definition of "probable danger of financial failure" and the *Hearst* standard of losses "not likely to be reversed." Furthermore, the Court finds that the Attorney General was not unreasonable in concluding that the Free Press was primarily motivated by competitive aims, not a JOA, in its recent business strategies. Therefore, this 14th day of September, 1988, plaintiffs' motion for summary judgment is hereby DENIED, defendants' motion for plenary summary judgment is hereby GRANTED, and the stay on the Attorney General's Decision and Order will be allowed to expire on September 17, 1988 at 7:15 p.m.

/s/ George H. Revercomb

George H. Revercomb, Judge

9/14/88

**United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 88-5286

**September Term, 1988
D.C. Civil No. 88-02322**

United States Court of Appeals
for the District of Columbia Circuit

Michigan Citizens for an Independent
Press, et al., Appellants

FILED JAN 27 1989

v.

CONSTANCE L. DUPRE
CLERK

Richard Thornburgh, United States
Attorney General, et al.

**APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA**

Before: ROBINSON, RUTH B. GINSBURG and
SILBERMAN, Circuit Judges

J U D G M E N T

This case came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
FOR THE COURT:

/s/ Constance L. Dupre, Clerk
Constance L. Dupre, Clerk

Date: January 27, 1989

Opinion for the Court filed by Circuit Judge Silberman.
Dissenting opinion filed by Circuit Judge Ruth B. Ginsburg.

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 28, 1988 Decided January 27, 1989
No. 88-5286

MICHIGAN CITIZENS for an INDEPENDENT PRESS, et al.,
APPELLANTS

v.

RICHARD THORNBURGH,
UNITED STATES ATTORNEY GENERAL, et al.

Appeal from the United States District Court
for the District of Columbia
(C.A. No. 88-02322)

William B. Schultz, with whom *David C. Vladeck* and *Alan B. Morrison* were on the brief, for appellants.

Clark M. Clifford, with whom *Robert A. Altman*, *Robert P. Reznick*, *Philip A. Lacovara* and *Gerald Goldman* were on the brief, for appellee The Detroit Free Press, Inc.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Douglas Letter, Attorney, Department of Justice, with whom *John R. Bolton*, Assistant Attorney General, *Jay B. Stephens*, United States Attorney, were on the brief for appellee Thornburgh, Attorney General, et al. *Robert K. Kopp* also entered an appearance for the Attorney General.

Lawrence J. Aldrich, *John Stuart Smith*, and *Gordon L. Lang* were on the brief for appellee The Detroit News, Inc.

Paul L. Friedman and *Anne D. Smith* were on the brief for amicus curiae Little Rock Newspapers, Inc. urging reversal.

W. Terry Maguire and *Claudia James* were on the brief for amicus curiae American Newspaper Publishers Association urging affirmance.

Before: ROBINSON, RUTH B. GINSBURG, and SILBERMAN, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

Dissenting opinion filed by *Circuit Judge* RUTH B. GINSBURG.

SILBERMAN, *Circuit Judge*: This case presents a challenge to a decision and order of the Attorney General, pursuant to the Newspaper Preservation Act ("NPA"), 15 U.S.C. 1801-1804 (1982), approving a joint operating arrangement between the Detroit Free Press and Detroit News newspapers. Appellants, which include Michigan Citizens For An Independent Press,¹ seven individuals,² and the interest group Public Citizen, brought suit

¹ At the time this suit was filed, Michigan Citizens For An Independent Press had twenty members who either read, purchase classified advertising in, or are employed by one of the newspapers.

² The seven individual plaintiffs include persons who purchase advertising in the papers and allege that advertising prices will rise if the JOA is approved.

against the Attorney General and the two newspapers in the district court alleging that the Attorney General's decision violates the NPA and the Administrative Procedure Act, 5 U.S.C. § 706 (1982), because it is not based on substantial evidence, is arbitrary and capricious, and is otherwise in violation of law. The district court granted summary judgment in favor of defendants, and plaintiffs appealed to this court. We conclude that the Attorney General's decision was based on a permissible construction of the statute, and that his application of the legal standard to the facts of this case was not arbitrary, capricious, or an abuse of discretion. We therefore affirm the judgment of the district court.

I.

A.

Congress passed the Newspaper Preservation Act in 1970 with the stated purpose of "maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States." 15 U.S.C. § 1801. The Act creates an exemption to the antitrust laws that permits a joint newspaper operating arrangement ("JOA")³ between two newspapers if the Attorney

³ The Act defines a "joint newspaper operating arrangement" as "any contract, agreement, joint venture (whether or not incorporated), or other arrangement entered into by two or more newspaper owners for the publication of two or more newspaper publications, pursuant to which joint or common production facilities are established or operated and joint or unified action is taken or agreed to be taken with respect to any one or more of the following: printing, time, method, and field of publication; allocation of production facilities; distribution; advertising solicitation; circulation solicitation; business department; establishment of advertising rates; establishment of circulation rates and revenue distribution: *Provided*, that there is no merger, combination, or amalgamation of editorial or reportorial staffs, and that editorial policies be independently determined." 15 U.S.C. § 1802(2).

General determines that one of the papers is "a failing newspaper" and that the arrangement will "effectuate the policy and purpose" of the Act. 15 U.S.C. § 1803(b).⁴ A "failing newspaper" is defined as "a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure." 15 U.S.C. § 1802(5).

The first joint newspaper operating arrangement was started by three newspapers in Albuquerque, New Mexico in 1933, and by 1966 there were twenty-two JOAs in effect. In 1964, the Department of Justice initiated an investigation of newspaper JOAs, and in 1965 it sued the publishers of two daily newspapers in Tucson, Arizona, which operated jointly, for violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 and section 7 of the Clayton Act, 15 U.S.C. § 18. The trial court in that suit found violations of all of those provisions, and the Supreme Court upheld that finding in *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969).

The Court rejected the newspapers' argument that the so-called "failing company" defense—a judicially created doctrine—absolved them from liability under the antitrust laws. *Id.* at 137-38. Under the "failing company" doctrine, conduct which would otherwise violate antitrust laws does not do so if one of the suspect businesses "faced the grave probability of business failure." *International Shoe Co. v. FTC*, 280 U.S. 291, 302 (1930). The doctrine

⁴ The entire provision reads as follows:

It shall be unlawful for any person to enter into, perform, or enforce a joint operating arrangement, not already in effect, except with the prior written consent of the Attorney General of the United States. Prior to granting such approval, the Attorney General shall determine that not more than one of the newspaper publications involved in the arrangement is a publication other than a failing newspaper, and that approval of such arrangement would effectuate the policy and purpose of this chapter.

is based on the notion that a merger between two competitors, one of which is failing, cannot have an adverse effect on competition, because the failing company would disappear as a competitive factor whether or not the merger occurred.

In *Citizen Publishing*, the Court narrowly confined the scope of the doctrine. It held that a financially troubled company may not employ the "failing company" defense unless it meets three conditions. The disputed merger may be sought only when the owners of the "failing" company are contemplating liquidation; indeed, the JOA must be the "last straw" at which the company can grasp. 394 U.S. at 137. The defendants are required to establish that the company that acquires the failing company is "the only available purchaser," *id.* at 138, and finally, the prospects for successful reorganization under the bankruptcy laws must be "dim or nonexistent." *Id.* Because the Tucson papers did not make such a showing, their JOA violated the Sherman Act.

Congress reacted to *Citizen Publishing* by passing the Newspaper Preservation Act, which established a less stringent test for newspapers seeking a JOA. S. REP. No. 535, 91st Cong., 1st Sess. 4 (1969). Congress did not question the Court's reasoning in defining the failing company doctrine, but it felt that "the economics of the newspaper industry make it more likely for newspapers to fail when faced with competition than other businesses." *Id.* As the Senate Judiciary Committee noted, "when a newspaper is failing it is harder to reverse the process and it is almost impossible to find an outside buyer." *Id.* The NPA therefore provides that a newspaper is "failing" and eligible for a JOA when it is "in probable danger of financial failure." 15 U.S.C. § 1802 (5). The statute also includes what Congress meant to be a less strict standard for JOAs already existing in 1970. H.R. REP. No. 1193, 91st Cong., 2d Sess. 10 (1970). A pre-statute JOA is not unlawful if at the

time at which such arrangement was entered into, not more than one of the newspapers involved was "likely to remain or become a financially sound publication." 15 U.S.C. § 1803(a).

Since 1970, four new JOAs have been approved and implemented.⁵ In each of those cases, unlike the Detroit case, the "failing newspaper" was well into what in the newspaper industry is known as the "downward spiral." The fate of a struggling newspaper is thought to be determined by the close interrelationship between circulation and advertising revenues. Once a paper loses circulation, advertisers are less likely to purchase space in the paper. Readers, in turn, are less likely to buy a paper that is short on advertising, so circulation drops further. The result of this interrelationship is an apparently irreversible downward plunge that ends in business failure. The only court to address the Act, *Committee for an Independent P-I v. Hearst Corp.*, 704 F.2d 467 (9th Cir.), *cert. denied*, 464 U.S. 892 (1983), concluded that a newspaper in the downward spiral satisfies the "probable danger of financial failure" test, as long as it had followed reasonable management practices. *Id.* at 479.

B.

The Detroit Free Press and the Detroit News are daily newspapers that compete in Detroit, which is the nation's fifth largest newspaper market. The papers are owned by the two largest news organizations in the United

⁵ Opinion and Order Regarding Application of Seattle Times Co. and Hearst Corp. for Approval of Joint Operating Arrangement, 417 Fed. Reg. 26,472 (1982); Newspaper Operating Arrangement—Times Printing Co., and the Chattanooga News-Free Press Co., 45 Fed. Reg. 58,733 (1980); Cincinnati Post and Cincinnati Enquirer, Approval of Joint Operating Arrangement, 44 Fed. Reg. 68,537 (1979); Anchorage Daily Times and the Anchorage Daily News: Findings on Application for Approval of Joint Operating Arrangement, 39 Fed. Reg. 41,754 (1974).

States; Knight-Ridder, Inc. owns the Free Press, and the Gannett Company has controlled the News since February 1986, when it purchased the paper from the Evening News Association. Over the past fifteen years, the papers have been engaged in fierce competition for absolute dominance of the Detroit market, which was motivated, at least initially, by the knowledge that many junior papers have been unable to survive as the second paper in metropolitan area competition.

This bitter fight has led to large operational losses by both papers. The Free Press has lost money every year since 1979, and it lost over \$10 million per year from 1981 to 1986. The News has sustained operational losses since 1980, and it lost over \$50 million between 1981 and 1986. A circulation price war has driven the daily prices in Detroit to twenty cents for the News and fifteen cents for the Free Press—probably the lowest daily prices in the United States. In recent years, the News has maintained a consistent circulation lead of approximately 51% to 49%. Perhaps more important, the News has continuously maintained more than a 60% share of total full-run advertising lineage.

As a result of their losses, the papers began to consider the alternative of a JOA as early as 1980 when the chief executive officers of Knight-Ridder and the Evening News Association first discussed the possibility. Negotiations continued sporadically from January 1981 to January 1984, but no agreement was reached during that period. In August 1985, Gannett agreed in principle to purchase the News from the Evening News Association, and senior officials of Gannett and Knight-Ridder thereafter met 16 times between August 1985 and April 1986 to shape the final agreement. On April 11, 1986 the News and the Free Press executed the JOA.

The agreement, which has an initial term of 100 years, provides—as is typical—that the news and editorial staffs

of the two papers are to remain independent and insulated from influence by the other party to the arrangement. The Free Press would publish a morning paper on Monday through Friday, and the News would print a corresponding afternoon edition. On Saturday and Sunday, the parties would publish only one paper, with each paper assuming separate editorial and news responsibilities.

During the first three years of the JOA, the News would receive 55% of the profits of the combined enterprise, while the Free Press would receive 45%. In the fourth and fifth years, the profit split would reduce to 53%/47% and 51%/49%, respectively. Beginning in the sixth year, the profits and losses would be shared equally by the News and the Free Press.

On May 9, 1986, the two papers applied for approval of the JOA by the Attorney General as required by the Act, and the application was referred to the Assistant Attorney General in charge of the Antitrust Division, pursuant to Justice Department regulations. See 28 C.F.R. § 48.7 (1988). The then Assistant Attorney General, Douglas H. Ginsburg (now Judge Ginsburg), issued a report on July 23, 1986, concluding that the applicants had “not yet sustained their burden of proof of showing that the Detroit Free Press is a ‘failing newspaper’ within the meaning of the Act and that approval of the application would effectuate the policy and purpose of the Act.” However, he did not advise disapproval of the application; instead, he recommended that the Attorney General order that a hearing be held before an administrative law judge to resolve material issues of fact raised by the application. See 28 C.F.R. § 48.7(b)(2) (1988).

Attorney General Edwin Meese followed his Assistant Attorney General's advice and pursuant to the Justice Department's regulations, 28 C.F.R. § 48.10, an administrative law judge was appointed to conduct the hearing. On December 29, 1987, ten months later, the ALJ issued

a decision, recommending that the application be denied. He concluded, *inter alia*, that the applicants had failed to prove that there exists in Detroit an irreversible market condition that will probably lead to the failure of the Free Press. According to the ALJ, the Free Press is not dominated by the News and the Free Press is not in a downward spiral toward failure. He instead attributed the losses incurred by the Free Press and the News to "their strategies of seeking market dominance and future profitability at any cost along with the expectation that failure to achieve these goals would result in favorable consideration of a JOA application."

The ALJ did not deny that the fiercely competitive strategies employed by both papers were perfectly rational, given the disastrous history of junior papers in the United States. But he believed that each paper had an eye on a potential JOA application in the event that it turned out to be the loser. They both saw the JOA as a safety net, in other words, and were thereby encouraged to engage in particularly risky competitive acrobatics.

Indisputably, the News was leading the Free Press in most of the circulation, revenue, and advertising lineage figures used to measure the relative positions of rival newspapers. The ALJ maintained, however, that the Free Press was within "striking distance" of the total circulation lead, and that the News' advertising lead was "vulnerable" to a change in the circulation lead. Neither paper could achieve profitability as long as they both pursued the current price war, but he believed that the record did not support the conclusion that "reader and advertiser demand in Detroit is so inadequate that the market cannot sustain two profitable papers irrespective of changes in pricing policies." He hypothesized that Detroit could sustain two profitable papers if the Free Press and the News both raised circulation and advertising prices. Still, he recognized that since "neither the

Free Press nor the News can raise circulation or advertising prices without regard to what the other paper does, there is no completely unilateral course of action which either paper can pursue which would return it to profitability."

The ALJ accepted the testimony of the Antitrust Division's expert, who calculated that the 50/50 profit split (after five years) represented a perception by Gannett that it could not achieve domination of the market for "at least seven years." He was, moreover, unpersuaded by Gannett officials' testimony that if the JOA were denied, they would *not* raise circulation prices, and he found "contemporaneous evidence" indicating that "absent a JOA Gannett may eventually initiate circulation price increases." He also assigned "little weight" to testimony from Knight-Ridder's CEO that he would close down the Free Press if the JOA application were denied. Essentially, the ALJ predicted that if the JOA were denied, the News would give the Free Press sorely needed relief by raising the News' circulation and advertising prices, thereby allowing the Free Press to follow suit.

Attorney General Meese, in his opinion of August 8, 1988, disagreed with the conclusions of the ALJ and granted approval of the JOA. The Attorney General "accepted as accurate the fact findings of the Administrative Law Judge," but differed with his "ultimate conclusion as to where those facts lead." Adopting the legal standard enunciated by the Ninth Circuit in *Hearst* the Attorney General asked: "Is the newspaper suffering losses which more than likely cannot be reversed?" *Committee for an Independent P-I v. Hearst*, 704 F.2d 467, 478 (9th Cir.), *cert. denied*, 464 U.S. 892 (1983). The Attorney General decided that the answer was yes: the Free Press had met its burden of proof, because it had suffered persistent operating losses over nearly a

decade and had no prospect of unilateral action to reverse those losses.

Central to the Attorney General's opinion was his disagreement with the ALJ's prediction of future behavior by the two papers in the event that the JOA is denied. He noted and accepted the ALJ's finding that the News was in a stronger competitive position according to all major economic indices. But he determined—or more accurately predicted—that if the News continues its current pricing practices, it “undoubtedly has the ability on such terms to outlast the Free Press.” Given this premise, the Attorney General found persuasive Gannett's testimony that it would continue its current competitive policies (and not raise prices), which he said “hardly reflects unsound business judgment.” Similarly, the Attorney General felt that the testimony of Knight-Ridder's CEO concerning a possible closure of the Free Press “cannot be wholly disregarded,” because it would be “neither counterintuitive nor contradictory” for Knight-Ridder to discontinue the paper if it concluded that it could not outlast the News in a prolonged price war.

In response to the allegation that the papers had pursued their competitive strategies *because* of the potential of a JOA, the Attorney General read the record as showing that Knight-Ridder was not “*principally* pursuing any end other than market domination.” (emphasis added). Moreover, he noted that “newspapers cannot be faulted for considering and acting upon an alternative that Congress had created.”

II.

Appellants allege that the Attorney General's determination is invalid both because it is based on an impermissible interpretation of the statute and is ar-

bitrary or capricious.⁶ As is not unusual in appeals from agency actions, the claims are interrelated. At the core of appellants' case is the assertion that the Attorney General could not legally grant approval for a JOA because the Detroit Free Press was not in a tough enough spot to qualify as “in probable danger of financial failure.” Whether the Attorney General legally decided that the Free Press did meet the statutory standard in turn depends to a large extent on whether his prediction of the newspapers' future course (if he did not approve the JOA) was reasonable. The Attorney General's interpretation of the probable danger of financial failure test draws content from the factual showing that he requires to meet that test. See *INS v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1221 (1987) (ambiguous statutory terms “can only be given concrete meaning through a process of case-by-case adjudication”). And there is no question in our mind that if the Attorney General's statutory interpretation is reasonable, it is entitled to deference under *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-43

⁶ Appellants argue at some length that parts of the decision should be reviewed under the “substantial evidence” test of section 706(2)(E) of the APA rather than the “arbitrary or capricious” standard, because the Attorney General based his conclusions on a record compiled after a formal hearing. The substantial evidence test applies, though, only in cases where “an agency hearing [is] provided by statute.” 5 U.S.C. § 706(2)(E) (1982); see *CNA Financial Corp v. Donovan*, 830 F.2d 1132, 1153 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 1270 (1988); *Maryland Dept. of Human Resources v. Department of HHS*, 763 F.2d 1441, 1451 n.7 (D.C. Cir. 1985). The Newspaper Preservation Act does not require that a hearing be held; a hearing is provided for only in the Justice Department's regulations. 28 C.F.R. § 48.10 (1988). In any event, we reiterate that in the view of this court, the “meaning of the ‘substantial evidence’ terminology connotes a substantive standard no different from the arbitrary or capricious test.” *Association of Data Processing Orgs., Inc. v. Board of Governors*, 745 F.2d 677, 685 (D.C. Cir. 1984).

1984), because we are certainly unable to discern a specific congressional intent governing this case.

Not surprisingly, the exact meaning of the linguistically imprecise phrase "probable danger of financial failure" is not apparent from the statute or the legislative history. The Senate bill, which differed slightly from the House version, "defined" a failing newspaper as one "in danger of probable failure." The Senate took this phrase—or at least the words "probable failure"—from the Bank Merger Act, 12 U.S.C. § 1828(c) (3) (1982), recognizing that the phrase was informed by the Supreme Court's decision in *United States v. Third National Bank*, 390 U.S. 171 (1968). S. REP. NO. 535, 91st Cong., 1st Sess. 2 (1969). The House version, which was eventually adopted, used the clause "probable danger of financial failure" as the standard for new JOAs (emphasis added). Despite its minor difference from the Senate version, the chief House sponsor of the bill explained that "[t]he term 'probable danger of financial failure' . . . comes out of the Bank Merger Act," and "is understood by the courts in the field." 116 Cong. Rec. 23,146 (1970) (statement of Rep. Kastenmeier). The Supreme Court had held in *Third National Bank* that where managerial deficiencies are responsible for a bank's financial problems, the banks, in order to prove "probable failure," must establish that improved management could not achieve profitability. 390 U.S. at 190. More generally, the parties seeking the merger must "reliably establish the unavailability of alternative solutions" to the financial woes of the failing bank. *Id.* Thus, strong evidence of probable failure was required.

To be sure, the Attorney General had not previously faced a case such as this. Prior approvals of JOAs had always involved at least one newspaper that had actually entered the downward spiral, whereas the Detroit Free Press could be said to be poised on the brink of the spiral, its future dependent on the competitive behavior

of the *News*.⁷ Still, the only prior case reviewing an Attorney General's approval of a JOA—the pre-*Chevron* decision of the Ninth Circuit in *Hearst*—phrased the question before the Attorney General in broader terms than whether one of the newspapers had entered a downward spiral. The court asked: "Is the newspaper suffering losses which more than likely cannot be reversed?" This interpretation of the statutory language, which the court called a "commonsense construction," *id.* at 478, was explicitly adopted by the Attorney General in this case, and thus made his own interpretation entitled to *Chevron* deference. Only for cogent reasons would we reject as unreasonable an interpretation of a statute that a sister circuit had considered a commonsense construction.

The Ninth Circuit thought implicit in its inquiry was an examination of alternative forms of relief for the putatively failing newspaper. Was there, for example, a group of interested buyers or a potential for improved management? Congress' reference to the *Third National Bank* case in the legislative history of the statute suggested to the Ninth Circuit that Congress intended the Attorney General to consider alternatives to a JOA before approving an application. We quite agree, but so apparently did the Attorney General. He concluded that if no form of relief was within the control of the sick newspaper—its survival depended only on improbable behavior by its competitor—the statutory test was satisfied. Appellants artificially construe the Attorney General's decision to permit a JOA without regard to con-

⁷ Appellants deny that they claim that only a newspaper in a downward spiral may qualify under the statutory test. But their argument seems necessarily to imply just that, since it is based on the notion that the Free Press' losses and the News' continued strength in circulation and advertising are not sufficient objective factors to support the Attorney General's decision.

sideration of the competitors' behavior, but that is not what the Attorney General said.

The dissent suggests that the Attorney General's statutory construction is impermissible because it did not employ the interpretative canon that exemptions to the antitrust laws—like all exemptions—should be construed narrowly. *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979). Certainly, courts interpreting the antitrust statutes have often employed that canon. See, e.g., *Hearst*, 704 F.2d at 473 (“Our review of the Newspaper Preservation Act and its interpretation by the Attorney General is guided by [the] additional rule . . . [that] exemptions to the antitrust laws are to be narrowly construed.”).⁸ But *Chevron* implicitly precludes courts picking and choosing among various canons of statutory construction to reject reasonable agency interpretations of ambiguous statutes. If a statute is ambiguous, a reviewing court cannot reverse an agency decision merely because it failed to rely on any one of a number of canons of construction that might have shaded the interpretation a few degrees in one direction or another.

We do not mean to say that canons of construction are completely irrelevant in the post-*Chevron* era. If employment of an accepted canon of construction illustrates that Congress had a *specific* intent on the issue in question, then the case can be disposed of under the first prong of *Chevron*. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448-49 (1987) (“ordinary canons of statutory construction” provided “compelling” evidence that Congress intended “well-founded fear or persecution” standard to be different from “clear probability of persecution.”). For example, if Congress banned the

⁸ The pre-*Chevron* decision of the *Hearst* court did mention deference, 704 F.2d at 473, but does not seem really to have deferred to the Attorney General's construction.

importation of apples, oranges, and bananas from a particular country, the canon of *expressio unius est exclusio alterius* might well indicate that Congress *did not* intend to ban the importation of grapefruits. In that event, an agency decision to ban grapefruits would be contrary to Congress' specific intent. As a corollary, we held in *American Fed'n of Gov't Employees v. FLRA*, 798 F.2d 1525, 1528 (D.C. Cir. 1986), that the FLRA's interpretation of the Federal Service Labor-Management Relations Statute was impermissible because it “ignore[d] the familiar canon that statutes should be construed ‘to give effect, if possible, to every word Congress used.’” The FLRA's construction had resulted in “an effective repeal” of part of the statute, *id.* at 1529, and thereby frustrated the intent of Congress.

In this type of case by contrast, the Attorney General is called upon to balance two legislative policies in tension: The pro-consumer direction of the antitrust laws and a congressional desire embodied in the Newspaper Preservation Act that diverse editorial voices be preserved despite the unique economics of the newspaper industry. This is precisely the paradigm situation *Chevron* addressed. If the agency's choice “represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.” *Chevron*, 467 U.S. at 845 (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)). To invoke the normal canon of construction is merely to say that the Attorney General put too much weight on the policy of preserving editorial diversity. We are not now after *Chevron*—if we ever were—permitted to accept such an argument.

Appellants argue that the Attorney General should receive less deference than *Chevron* requires, because “his interpretation of the statute was different from that

of the Antitrust Division, where the Justice Department's expertise on the Newspaper Preservation Act resides." We have previously rejected the notion that *Chevron* deference is based solely on agency expertise. *Public Citizen v. Burke*, 843 F.2d 1473, 1477 (D.C. Cir. 1988); *Cablevision Systems Dev. Co. v. Motion Picture Ass'n of America*, 836 F.2d 599, 608-09 (D.C. Cir. 1988). The rationale of *Chevron* is also grounded in the principle that the political branches of government, rather than the judiciary, should make policy choices. *Chevron*, 467 U.S. at 865-66.

Nevertheless, our dissenting colleague seems to accept the argument, since she relies heavily on the Antitrust Division's brief submitted to the ALJ. Dissent at 2 n.3, 4 n.5, 6 n.6. It is not surprising that the Division—charged with the front line responsibility for enforcing the antitrust laws—sought a narrow interpretation of sections 1802(5) and 1803(b). Congress, however, did not place responsibility for reconciling the conflicting policies and values called for in this type of case upon the Antitrust Division, but rather on the Attorney General, who might be thought to have a broader perspective.

It is also suggested, dissent at 4-5, that the Attorney General's decision is legally defective because he did not explain his interpretation of the conceptual difference between the section of the statute that applied to this transaction and the section that did *not* apply. The latter, section 1803(a), governs the legality of pre-statute JOAs and is more lenient because a JOA is authorized if, when entered into, not more than one of the newspapers involved was "likely to remain or become a financially sound publication." We do not understand our dissenting colleague to argue that the Attorney General's interpretation of section 1803(b) necessarily overlaps section 1803(a). A financially sound publication might, for instance, be defined as one that is consistently profitable, indeed, profitable enough to recover its cost

of capital. That is worlds away from a newspaper that is "suffering losses which more than likely cannot be reversed." The dissent contends, instead, that the Attorney General was obliged to draw the exact boundaries between the two sections when applying only the one. That seems to us to require an agency to decide cases not before it, to offer dicta that we normally eschew. We know of no authority that would support such a holding.

III.

Even if the Attorney General is statutorily authorized to treat a newspaper as in probable danger of failing before it actually enters the downward spiral, appellants claim that the Attorney General's decision was arbitrary and capricious because not rationally connected to the facts before him. *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)) (agency must articulate a "rational connection between the facts found and the choice made"). This, as we have noted, is in essence a challenge to the reasonableness of the Attorney General's determination that the News had the economic power to outlast the Free Press and was not likely to reduce competitive pressure by raising prices.

The only specific challenge, as far as we can determine, to the Attorney General's appraisal of the respective competitive strengths of the two newspapers is based on the different opinion of the ALJ (and the Antitrust Division's brief to the ALJ). It is true that the Attorney General's crucial conclusions that the Free Press "has no realistic prospect of outlasting the News given the latter's substantial advertising and persistent circulation lead" and that the News "undoubtedly has the ability . . . to outlast the Free Press" was predicated on the ALJ's findings recounting the News' lead in all major indices. It is also true that the ALJ went on to offer

a somewhat different conclusion: that the Free Press was still within "striking distance" of the News and the latter's lead was "vulnerable." The Attorney General would not, however, be legally obliged to conform his judgment to that of a statutorily-required ALJ,⁹ much less this one, who was employed as a matter of discretion rather than law. See 28 C.F.R. § 48.8 (1988). Both men relied on the very same facts to make different evaluations of the competitive strength of the Free Press. But, it is only the Attorney General's conclusions that have legal significance, and we cannot say that his determination is unreasonable. It is undisputed, after all, that the News has maintained the lead for a long time and that the Free Press had suffered extensive losses. Debatable, the Attorney General's appraisal may well be, but hardly unreasonable.

Similarly, appellants rely on the ALJ's contrary prediction to dispute the Attorney General's conclusion that the News would *not* release the pressure on the Free Press by raising prices if the JOA were disapproved. Gannett officials testified that they had no intention of raising prices regardless of the Attorney General's decision. The ALJ refused to credit this testimony, not on account of the witnesses' demeanor, but because he, the ALJ, thought that course would only cause more losses for the News and was therefore irrational.¹⁰ Cf.

⁹ The APA explains that "[o]n appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule." 5 U.S.C. § 557(b). "[I]n the last analysis it is the agency's function, not the [ALJ's], to make findings of fact and select the ultimate decision." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 853 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

¹⁰ The ALJ said:

Newarth and other Gannett officials testified that without a JOA they will not raise circulation prices since

Universal Camera Corp. v. NLRB, 340 U.S. 474, 494-95 (1951) ("The significance of [the ALJ's] report . . . depends largely on the importance of credibility in the particular case."). The Attorney General's judgment of the News' likely future behavior was premised on his determination, which we have already found reasonable, that the News had the competitive strength to outlast the Free Press.¹¹ The ALJ never squarely found otherwise,¹²

they intend to maintain pressure on the Free Press as they seek market domination. This strategy received the endorsement of Applicants' retained expert. But Gannett officials and retained expert never explained how Gannett can persist in this strategy in the face of uncontroverted proof that neither the News nor the Free Press can become profitable so long as both papers continue current competitive strategies. As it happens, contemporaneous evidence indicates that absent a JOA Gannett may eventually initiate circulation price increases as the way to return the News to profitability. (citations omitted).

¹¹ The Attorney General wrote:

The argument is made that both papers should raise prices and discontinue advertising discounts. But the *Free Press* is currently selling its daily copy at 5 cents above the *News* and it offers a smaller discount rate. There is thus no competitive advantage to be gained by Knight-Ridder from a unilateral increase in prices; that market move must be accompanied by parallel price increases (and discount reductions) at the *News* if the papers have any chance of becoming profitable.

Gannett has made clear that it has no intention of embarking on such a course, either unilaterally or in conjunction with Knight-Ridder. While the Administrative Law Judge questioned the testimony of Gannett officials to this effect, it hardly reflects unsound business judgment to retain awhile longer the *News*' current depressed pricing practices with so many indications that the *Free Press* and Knight-Ridder have abandoned all hope of market domination. (citations omitted).

¹² The ALJ did predict at one point that the Free Press would "not enter the downward spiral so long as Knight-Ridder remains in Detroit." This view, however, seems to

and if the News had such strength, we do not see how the Attorney General's projection can be deemed unreasonable. Under those circumstances, Gannett's refusal to raise prices, as the Attorney General said, "hardly reflects unsound business judgment."

Knight-Ridder seems to have thought that its competitor's strategy was rational, since its CEO testified that if the JOA were disapproved, the Free Press would close down. The ALJ again assigned "little weight" to that testimony, because "if a Free Press closure was imminent, it would have made no economic sense for [the News] to agree to share prospective JOA profits with [the Free Press]." Also, he stressed that an anti-trust division expert had testified that the terms of the profit split (reaching 50/50 after five years) suggested that Gannett thought the Free Press would remain in existence for seven to ten years. The difficulty with the ALJ's analysis is that he equated the parties' bargaining positions prior to submission of a proposed JOA with their strategies after a rejection by the Attorney General. Prior to agreement, the Free Press had every incentive to convince the News that it would compete

rely on the notion of a "deep pocket" supporting the paper, which is an impermissible consideration under the NPA, 43 U.S.C. § 1802(5), *but see* dissent at 2, and furthermore irrelevant in light of basic principles of economics. *See* Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 270 (1981) ("[N]o theory of predation has explained *why* victims should lack access to capital There is no reason why the capital market should refuse to supply funds to the victim.").

He also projected that "[i]f the struggle continues, there is no convincing evidence that superior scale economies is [sic] likely to be determinative for the News." The import of this theory is unclear to us, because the downward spiral that leads to the demise of competitors in the newspaper industry is a phenomenon quite different from the traditional concept of advantageous economies of scale and apparently unique to this industry. *See supra* at 5-6.

fiercely, and indefinitely into the future: Damn the losses; full speed ahead. Only by emphasizing its potential longevity could the Free Press extract favorable terms in a JOA. Thus, the Attorney General described the situation as the parties entered into the JOA, as a "competitive stalemate" with market domination "no longer within the grasp of either paper." But, that the News was willing to negotiate peace terms (the JOA) does not belie the Attorney General's appraisal of its fundamental superior strength. After this proceeding, in which all cards are placed on the table, it is wholly unrealistic to assume that the parties will return to the game and play it as if this proceeding had never occurred. If a JOA were denied, the News would have every incentive to force the Free Press to the wall; even if it took seven years to win, at the end of that period the News would have a monopoly. And, if the Free Press were doomed to defeat in the long run, it was not only reasonable but optimal for the paper to close immediately.

The Attorney General had to consider which of the two papers would blink first in the event the JOA were *denied*. Gannett said that it would not, and Knight-Ridder said that it would. Appellants assert that it was unreasonable for the Attorney General to believe them, because the more likely event was the exact reverse: that if the JOA were denied, Gannett would raise prices and the Free Press would remain in business. The Attorney General, it would seem, did not want to play the high stakes regulatory game that his ALJ proposed. He obviously was concerned that if he gambled on the ALJ's prediction that both newspaper were bluffing, Detroit would lose a newspaper. That is not to say that the Attorney General should put undue stress on self-serving declarations by newspaper executives seeking a JOA. But here, the statements that the Attorney General credited follow a long period of bitter competition. For the

News to stay the course, as for the British and French in 1917, promised absolute victory.

It may well be, as appellants argue and the ALJ found, that under ideal circumstances, Detroit could support two newspapers. The same could also be true of many cities that have lost competing newspapers and now one newspaper monopoly towns. It is not at clear whether the newspaper business in some cities a natural monopoly, and, if so, in cities of what size. This sort of speculation, it seems to us, as it did to the Attorney General, is hardly conclusive. That an omniscient Detroit newspaper czar could set circulation and advertising prices that would permit both papers to return to profitable status is not a useful observation in this context. The Attorney General is required to determine what will actually happen in Detroit if his approval is withheld. It would, moreover, be anomalous for those responsible for enforcing the antitrust laws to try to guide and calibrate the competitive zeal of the two newspapers so as to reach that level of competition at which both newspapers could be profitable.

Appellants might also be understood to complain that the Attorney General did not provide a reasoned explanation for his decision, because his only citations to the record at certain crucial points were to portions of the ALJ's opinion that reached different conclusions based on the same facts. Of course, the decision of the ALJ is part of the record and must be considered by the court when it determines whether the Attorney General's ruling is supported by substantial evidence or, in this case, arbitrary or capricious. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 493 (1951). We have said that an agency must both express an awareness that it is disagreeing with an ALJ and set forth the basis of the disagreement. *Local 441, IBEW v. NLRB*, 510 F.2d 1274, 1276 (D.C. Cir. 1975); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 853 (D.C. Cir. 1970),

cert. denied, 403 U.S. 923 (1971). To reverse the Attorney General, however, for failure to state at the exact point of the citations the obvious nature of his disagreement with the ALJ would be excessive judicial nitpicking. His difference with the ALJ is clear throughout the opinion, and although "[t]he explanation may have been curt, . . . it surely indicated the determinative reason for the final action taken." *Camp v. Pitts*, 411 U.S. 138, 143 (1973).

* * *

The real difficulty with this case—the factor that quite plainly underlies the ALJ's discomfort as well as appellants' quarrel with the Attorney General's decision—is the effect that the prospect of a JOA has on the behavior of competing newspapers. *See also* dissent at 5. It is feared that the statute authorizing a JOA creates a self-fulfilling prophecy. Newspapers in two newspaper towns will compete recklessly because of a recognition that the loser will be assured a soft landing.

Appellants argue that the Attorney General inadequately considered whether or not "critical aspects of the newspapers' conduct were influenced by the prospect of obtaining a JOA." But his opinion addressed this "dual motive" concern at some length; he observed that this was not the classic case that had worried Congress, where a newspaper had "brought itself to the brink of financial failure through improper marketing practices or culpable management." Instead, the record of years of fierce competitive and consequent losses to both papers led the Attorney General reasonably to conclude that both papers were principally pursuing market domination and that their strategies had been followed before any mutual discussion of a JOA. Nevertheless, the Attorney General implicitly recognized that it would be impossible completely to preclude competing newspapers from factoring into their business strategy the prospect of a JOA. As he laconically put it, "newspapers cannot be faulted

for considering and acting upon an alternative that Congress has created.”¹³

We can envision a perfectly rational different policy, one that would require a showing that the weaker paper was more bloodied before approving a JOA and therefore *might* discourage the sort of competition we saw in Detroit. Congress, however, delegated to the Attorney General, not to us, the delicate and troubling responsibility of putting content into the ambiguous phrase “probable danger of financial failure.” We cannot therefore say that his interpretation of that phrase as applied to this case, with all of its obvious policy implications, was unreasonable. The judgment of the district court therefore is

Affirmed.

¹³ We need not consider the hypothetical situation where the initial and principal motivating factor behind a price war is the prospect of a future JOA. The Attorney General was reasonable to conclude that this record did not present such a situation.

GINSBURG, RUTH B., *Circuit Judge, dissenting*: As a condition to the consummation of a joint operating agreement (JOA), and receipt of the attendant antitrust exemption, Congress required the approval of the Attorney General, an approval intended to “act as a brake” upon premature resort to such devices. 116 CONG. REC. 2006 (1970) (statement of Sen. Hruska). In this important and unprecedented case, the Attorney General approved a JOA and, in so doing, rejected the contrary conclusions of the administrative law judge (ALJ) and the Justice Department’s Antitrust Division, as elaborated in the post-hearing brief the Division presented to the ALJ. At issue is a large and attractive newspaper market, Detroit, one concededly capable of sustaining two profitable newspapers. I have grave doubts whether the Attorney General properly performed in this instance the braking function Congress envisioned for him. I would therefore remand the case for reconsideration and a fuller account of the standard of approval the Attorney General deems applicable.

I.

As the Antitrust Division emphasized before the ALJ, no prior JOA application “has presented a comparable situation.” Post-Hearing Brief of the Antitrust Division, Docket No. 44-03-24-8 (Sept. 23, 1987) [hereafter, Antitrust Division Brief], at 2. The Detroit Free Press (a morning newspaper)-Detroit News (evening paper) application “involves the largest market and largest newspapers” in the nation “ever to be involved in a JOA.” *Id.*¹ Applicants concede that the Free Press is unlike any

¹ The Assistant Attorney General in charge of the Antitrust Division, in recommending that a hearing be held before an ALJ, stated: “Clearly, Detroit remains one of the largest and most attractive newspaper markets in the country.” Report of the Assistant Attorney General, Public File No. 44-03-24-8 (July 21, 1986) [hereafter, Assistant Attorney General Report], at 3 (executive summary); *see id.* at 27 (same observation).

other newspaper thus far declared "failing." The typical case presents an applicant caught in a "downward spiral" in which the newspaper's "declining circulation and lessening advertising feed off one another, eventually forcing it to close." *Committee for an Independent P-I v. Hearst*, 704 F.2d 467, 471 (9th Cir.), *cert. denied*, 464 U.S. 892 (1983). The only Newspaper Preservation Act-JOA before this one to be examined in court, *Hearst*, fit that description.

Just as there is no dispute that the Free Press and the News have both incurred significant losses on an operating basis,² so it is undisputed that neither paper has experienced any "downward spiral" effect. On the contrary, in the relevant time period, 1976 to 1986, the Free Press share of daily circulation was never less than 49%; its competitive position has remained essentially stable; the News, though retaining a "leading" edge, is not "dominant." Antitrust Division Brief at 7-11. In other words, the two papers, each now maintained by a "deep pocket," the News by Gannett, the Free Press by Knight-Ridder, have fought to a draw. Neither has achieved supremacy. The competition today "is as close, or closer, than it was a decade ago." *Id.* at 2.³

Gannett, it is also conceded, acquired the News only after obtaining expression of Knight-Ridder's willingness

² As the Majority Opinion (Maj. Op.) at 7 reports, the Free Press lost over \$10 million per year from 1981 to 1986, while the News lost over \$50 million between 1981 and 1986.

³ This portrait of the competitive situation, drawn in the Antitrust Division Brief, contrasts with the majority's depiction of the Free Press as "poised on the brink of the [downward] spiral." Maj. Op. at 13. The majority recognizes that the downward spiral is indicated "[o]nce a paper loses circulation." *Id.* at 6. In this light, the Antitrust Division emphasized the precarious position of the News: "The News has been unable to convert its leads into any degree of profitability; instead, its losses in 1986 increased as it sought to protect a daily circulation lead which it appeared to be on the verge of losing." Antitrust Division Brief at 10.

to consider a JOA. *Id.* at 27-28. The nearly equal profit split for the Free Press under the JOA indicates the "standoff" that existed; it reflects "a recognition on Gannett's part that the Free Press was not likely to exit the market in the near future." *Id.* at 20-22. No "failing" paper in Newspaper Preservation Act history, it appears, has emerged so advantageously under an approved JOA. *Id.* at 22. In these circumstances, I believe it incumbent on the Attorney General to recall—as our sister court observed—the legislature's "primary" concern "to prevent newspapers from allowing or encouraging financial difficulties in the hope of reaping long-term financial gains through a JOA." *Hearst*, 704 F.2d at 478.⁴

II.

Three "failing newspaper" standards figured in the design of the Newspaper Preservation Act: the deathbed "failing company" doctrine which Congress rejected; the "not likely to remain or become financially sound" standard Congress adopted for existing JOAs, *i.e.*, those entered into prior to July 24, 1970; and the "probable danger of financial failure" definition Congress set for future JOAs. See 18 U.S.C. §§ 1802(5), 1803(a), (b) (1982); *Hearst*, 704 F.2d at 473-74. Under the "failing company" doctrine, as stated by the Supreme Court in *Citizen Publishing Co. v. United States*, 394 U.S. 131, 137-38 (1969), newspapers with JOAs could successfully defend against illegal merger or agreement charges only upon showing an enterprise in dire financial straits, on the brink of collapse, reaching for "the last straw." Congress thought that doctrine too exacting. It settled on a more lenient definition to grandparent existing

⁴ Cf. Assistant Attorney General Report at 6-7 (executive summary) ("When a newspaper owner consciously and deliberately decides to sacrifice short-term profits in a quest for greater long-term profits, indeed potential monopoly profits, should a JOA be available as a 'second-best' alternative?"); *id.* at 66 (same query).

JOAs and, as the Attorney General acknowledged in this case, it conceived the "probable danger of financial failure" standard for future JOAs as a "middle ground," one falling in between the other two. See Attorney General's Decision and Order, Docket No. 44-03-24-8 (Aug. 8, 1988) [hereafter, Attorney General's Decision], at 8.

The Newspaper Preservation Act's legislative history confirms that the "probable danger" standard was meant to have bite, to be "far more stringent" than the "not financially sound" test, 116 CONG. REC. 23,146 (statement of Rep. Kastenmeier), and thus "limited only to those situations where a joint newspaper operating arrangement is demonstrably essential to prevent a newspaper failure." *Id.* at 23,148 (statement of Rep. McCulloch). Given the congressional design, approval of a proposed JOA requires an affirmative answer to this question: "Is the [allegedly failing] newspaper suffering losses which more than likely cannot be reversed?" *Hearst*, 704 F.2d at 478.

The Attorney General's readiness to say "Yes" to a JOA for Free Press-Detroit News now, despite the view of the Antitrust Division and the ALJ that such a judgment remains premature,⁵ seems to me problematic on two counts. First, the Decision affords no assurance that the Attorney General has found a "middle ground" firmer than the pliant "not likely to . . . become financially sound" ground Congress thought inadequate for

⁵ It bears repetition that the ALJ's decision reflected the position presented to him as the decided view of the Antitrust Division, the very Department of Justice unit responsible for enforcing the antitrust laws. The bottom lines of the brief filed by the Division after the ALJ hearing state: "[T]he record does not warrant the conclusion that Detroit cannot support two competitive papers or that the Free Press is in probable danger of failure if the JOA is denied. The Antitrust Division therefore recommends that the application be disapproved." Antitrust Division Brief at 29.

new agreements. The Decision never suggests any separate content for the "probable danger" standard to distinguish it from the more accommodating one. Second, the demonstration that satisfied the Attorney General allows parties situated as Gannett and Knight-Ridder are artificially to generate and maintain the conditions that will yield them a passing JOA. I remain unpersuaded that, with passage of the Newspaper Preservation Act, Congress opened the door to this sort of self-serving, competition-quieting arrangement. *Cf.* Attorney General's Decision at 12 (maintaining that "Congress opened the door to just this sort of response with passage of the Newspaper Preservation Act").

It is accepted by the Attorney General that the Free Press and News have arrived at a "competitive stalemate," Attorney General's Decision at 5, and that market dominance is "no longer within the grasp of either paper." *Id.* at 13. It is also a "given" that "the Detroit market *could* sustain two profitable newspapers if both circulation and advertising prices were increased." *Id.* at 9 n.3 (emphasis in original). But "the unbroken pattern of annual operating losses" cannot be reversed by Free Press "unilateral actions," and that, in the Attorney General's judgment, makes "probable" if not "imminent" the "danger of financial failure." *Id.* at 7, 12.

Without the lure of a JOA, however, what reason is there to believe that the losses here "likely *cannot* be reversed"? Absent the Attorney General's promise of that large pot of gold, would the parties not have, as the Antitrust Division suggested, an effective "incentive to adopt strategies directed toward achieving profitability in a competitive marketplace"? Antitrust Division Brief at 27, 28.

The Attorney General does not disavow "the well-recognized rule that antitrust exemptions must be narrowly construed." *Hearst*, 704 F.2d at 478 (citing *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205,

231 (1979)). This accepted rule⁶ should be factored into an evaluation already weighted by (1) the concession that both newspapers, by their own projections, "could achieve profitability with price increases and the elimination of discounting," Attorney General's Decision at 5, and (2) the burden of proof which JOA applicants bear, 28 C.F.R. § 48.10(a)(4) (1988). A remand would give the Attorney General an opportunity to state more comprehensibly why the JOA-route is ripe for his approbation now, i.e., why that course should not be deferred for consideration "at some future time" when the results of the current competition afford a firmer basis for predicting whether the Free Press, profitably for itself, for readers, and for advertisers, can survive. See Antitrust Division Brief at 29.

CONCLUSION

Detroit, as the Attorney General said, "is a highly prized \$300 million dollar market." Attorney General's Decision at 4. That market could sustain two profitable newspapers. *Id.* at 9 n.3. Market dominance is now beyond the grasp of the News as well as the Free Press. *Id.* at 13. The Attorney General has not cogently explained why, on the facts thus far found, the proposed

⁶ My colleagues deem the rule one the Attorney General need not "pick" if he finds the statute ambiguous. See Maj. Op. at 15-16. At the same time, however, my colleagues recognize that the *Hearst* court's analysis was "guided by" the rule. *Id.* at 15. *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984), modifies *Hearst* pro tanto, the majority next maintains, and relegates the "narrow construction of antitrust exemptions" rule to cases in which Congress had a specific intent. See Maj. Op. at 15. Did *Chevron* indeed uproot a guide (both to the executive and to the judiciary) of such "fundamental importance" (*Hearst*, 704 F.2d at 473) to antitrust law administration? Under *Chevron*, is it the Attorney General's prerogative to construe an ambiguously-phrased antitrust law exemption expansively? The answer to these questions, I believe, unless and until Higher Authority tells us unambiguously otherwise, must be "No."

JOA has become "an available option." *Id.* Making the JOA an option now, in the situation artificially created and maintained by the Free Press and the News, moves boldly away from the "frame of reference [Congress] essentially embraced"—"the scenario of a strong newspaper poised to drive from the market a weaker competitor," a newspaper experiencing, "due to external market forces," a decline in revenues and circulation "that in all probability cannot be reversed." *Id.* at 6, 13-14. I therefore dissent from the majority's disposition approving instant the giant stride the Attorney General has taken.

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Issued: February 24, 1989

No. 88-5286

MICHIGAN CITIZENS FOR AN INDEPENDENT PRESS, et al.,
APPELLANTS

v.

RICHARD THORNBURGH,
UNITED STATES ATTORNEY GENERAL, et al.

Appeal from the United States District Court
for the District of Columbia

(C.A. No. 88-02322)

On Appellants' Suggestion for Rehearing *En Banc*

Before: WALD, *Chief Judge*; ROBINSON, MIKVA, EDWARDS, RUTH B. GINSBURG, STARR, SILBERMAN, BUCKLEY, WILLIAMS, D.H. GINSBURG and SENTELLE, *Circuit Judges*.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

ORDER

Appellants' Suggestion for Rehearing *En Banc* has been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing it is

ORDERED, by the court *en banc*, that the suggestion is denied. It is

FURTHER ORDERED, by the court *en banc*, on its own motion, that the stay of implementation of the joint operating agreement reimposed by the order of February 2, 1989, shall remain in effect until 5:00 p.m. E.S.T. on March 6, 1989, to afford appellants an opportunity to apply to the Supreme Court for a stay beyond that date.

FOR THE COURT:
CONSTANCE L. DUPRE,
Clerk

Chief Judge WALD and *Circuit Judges* MIKVA, EDWARDS and RUTH B. GINSBURG would grant the suggestion for rehearing *en banc*.

A concurring statement of *Circuit Judge* SILBERMAN, joined by *Circuit Judge* ROBINSON, is attached.

A dissenting statement of *Chief Judge* WALD, joined by *Circuit Judges* MIKVA and EDWARDS, is attached.

Circuit Judges STARR and D. H. GINSBURG did not participate in this matter.

SILBERMAN, *Circuit Judge*, with whom ROBINSON, *Circuit Judge*, joins, concurring in the denial of rehearing *en banc*: The Chief Judge offers two justifications to slip *Chevron's* restraining leash. Neither is grounded on an actual construction of the statutory language (which she concedes is ambiguous) nor its legislative history. Instead, the Chief Judge first interposes a theoretical economic argument to challenge the reasonableness of the Attorney General's interpretation of the statute. The Attorney General's conclusion that the Detroit Free Press is in "probable danger of financial failure" is unreasonable, we are told, because it is based on an economically unreasonable prediction—that the Detroit News is willing to continue to price below its costs in order to drive the Free Press to close its doors.¹ This is unreasonable because sophisticated firms do not—over a significant period of time—cut prices in order to drive a competitor out of the market, *unless* entry barriers prevent new competitors from emerging. If new competitors could emerge, the costs incurred in driving the old competitor out of the market would be wasted. See *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 121 n.17 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986).

I quite agree with that proposition. But I cannot see its relevance to this case. Congress obviously would not have passed the Newspaper Preservation Act unless it had perceived entry barriers that prevented an effective challenge to a monopoly newspaper. And, although it is not up to us to question Congress' judgment, surely we have seen nothing in this case to suggest Congress was misinformed. Whether those entry barriers, as a theo-

¹ Or more accurately, the question is whether the Attorney General reasonably believed that the Detroit Free Press reasonably believes that the News will follow that course. In that event, as we said in our opinion, the Free Press' assertion that it will shut down if the JOA is denied is hardly incredible.

retical matter, are properly analyzed as due to a natural monopoly² or a variation on that classic economic theme (I am beginning to doubt that anyone truly understands the newspaper market) is beside the point. Congress authorized the Attorney General to prevent a city newspaper editorial monopoly—even at the risk of a shared economic monopoly—because it thought the unusual economics of the newspaper industry compelled that exception to the antitrust laws. Otherwise, one newspaper may achieve a stunning fusion of economic and editorial (political) power due to the loss of actual and potential competition. The Chief Judge's basic quarrel thus is with the premise of the statute itself.

Although the appellants did not present the theoretical gloss that the Chief Judge puts on their argument, they

² See C. Kaysen & D. Turner, *Antitrust Policy* 191 n.1 (1971) ("There are disturbing indications that newspaper publishing is approaching this unhappy state [of natural monopoly] in many cities and towns."). The Attorney General never took a position on whether the Detroit market is a natural monopoly, and the passage on which the Chief Judge relies obviously fails to suggest that he did. See Statement of Chief Judge Wald, at 2 n.2. The Attorney General simply said that "the *Free Press* plainly does not face external market forces—such as rising costs, competition from other media outlets and the siphoning off of readers from the metropolitan region to the suburbs—that would portend almost certain failure." And his statement that "the Detroit market *could* sustain two profitable newspapers *if* both circulations and advertising prices were increased" is not really inconsistent with the possibility that the Detroit market is a natural monopoly. See P. Areeda & D. Turner, *Antitrust Law*, § 621, at 48 (In a natural monopoly market, "demand may be sufficient at *some price* fixed by law or cartel to cover the costs of more than one producer, but the cost of production will be significantly lower with a single producer."). The ALJ did say that "there is no convincing evidence that superior scale economies is [sic] likely to be determinative for the News," but it is by no means clear that it is only or chiefly scale economies that cause one-newspaper towns. That may be why the newspaper market is so puzzling.

did rely—as does the Chief Judge—on the Attorney General's statement that hypothetically Detroit could support both papers. That would be so if—and this is a big if—both papers raised their prices. The Attorney General, however, never predicted how long that hypothetical situation would last or how it might be enforced.³ There is the rub. As Congress realized, *see* S. REP. NO. 535, 91st Cong., 1st Sess. 2-4 (1969), one of the competing newspapers in any American city seems all too often to achieve a dominant position, which means that a newspaper owner who holds an advantage in a two newspaper city might be irrational if he did *not* attempt to drive his competitor out of business. Otherwise, he might wake up one day to realize that he had lost the superior position and was already himself in the downward spiral. In other words, an unregulated long-term two newspaper competitive equilibrium may well be a rarity (if not a chimera), and surely no newspaper owner in such a market can be confident that he and his competitor are in that exceptional city. *See* 116 Cong. Rec. 1788 (1970) (Statement of Sen. Fong) (“[I]t [is] increasingly difficult for many newspapers to coexist in the same community under conditions of all-out economic competition.”). Accordingly, the ALJ found that the “strategies pursued by the Free Press and News . . . were perceived by management as economically rational given the history of the demise of junior papers which had entered the downward spiral.” ALJ Report, at 112-13. Even if the Detroit market was an exception to the prevailing pattern, the News (and the Free Press) could not possibly know that, and therefore neither paper would rationally gamble on such an assumption.

³ The ALJ did quote the management of the Free Press as saying that the paper could become profitable if “competitive pricing becomes rational and consistent with other markets around the country.” *See* Statement of Chief Judge Wald, at 1. But, as we explained in our opinion, all the Attorney General said was that some hypothetical pricing scheme could support two papers.

I do not see, in short, how the Chief Judge's interposition of economic theory supports her contention that the Attorney General's construction of the statute or his prediction as to the Detroit News' behavior is unreasonable.

Chief Judge Wald's second contention (inconsistent with her first) assumes that it *would* be reasonable for the News to continue to price below cost in order to drive the Free Press out of business, but argues that such behavior constitutes illegal predation—or something “perilously close” to illegal predation. The difficulty with this argument, no matter how couched, is not only was it not raised by appellant in this court,⁴ it was not raised by any party—including the antitrust division—before the ALJ or the Attorney General. Indeed, the ALJ specifically noted that it was unnecessary to consider whether predation would affect his analysis of the statute, because it was not argued in this case. ALJ Report, at 122 n.303. And he observed that competition short of predation—even that designed to drive competitors out of business—was irrelevant, since the NPA “neither penalize[s] nor

⁴ Appellants merely contended (*see* Statement of Chief Judge Wald, at 6 n.7) that the Attorney General's interpretation of the NPA would allow large corporate newspaper chains to obtain JOAs by pursuing a course of aggressive competition. Only the amicus mentioned predation, and its concern was that approval of the Detroit JOA would lead to illegal pricing in *Little Rock*. Amicus asserted that the Arkansas Gazette had engaged in “unprecedented” predatory action in hopes of obtaining a JOA (which suggests that Little Rock might be an appropriate place to advance the Chief Judge's argument). The amicus filed no public comments on the Detroit JOA with the Attorney General and did not seek to intervene in that proceeding. The major Detroit-area newspaper unions and Mayor Young of Detroit did intervene before the Attorney General, *see* 28 C.F.R. § 48.11, but did not appeal. Moreover, appellants only barely (in one sentence) made the argument that Judge Ruth B. Ginsburg focused on in her dissent—that exceptions to the antitrust laws should be narrowly construed.

reward[s] firms determined to eliminate their competition." *Id.* at 122. No party specifically challenged either of those observations of the ALJ at any stage in these proceedings. It is, of course, black letter law that an argument not made before an agency cannot be the basis of a legal challenge on appeal. *Unemployment Compensation Comm'n v. Aragon*, 329 U.S. 143, 155 (1947); *United States v. L.A. Tucker Trucklines*, 344 U.S. 33, 37 (1952); *Safir v. Kreps*, 551 F.2d 447, 452 (D.C. Cir. 1977) ("[A]ppellant is not free to raise points without regard to whether they were argued at some stage of the administrative process.").⁵

Chief Judge Wald's predation argument, moreover, implicates a good deal more than the Attorney General's approach to Joint Operating Agreements. If the Attorney General were to conclude that he would not approve a JOA if the stronger paper had engaged in below cost pricing for some period before the submission of the JOA, he would have to assume the responsibility for preventing that "predation." Otherwise, newspapers like the News would, for the reasons described above, engage in such behavior to achieve dominance in their markets without regard to a JOA. By suggesting that the News' pricing practices were "illegal predation," the Chief Judge, in other words, implicitly seeks to preempt prosecutorial decisions of the Executive Branch.

Nevertheless, the Attorney General and his Antitrust Division might ponder Chief Judge Wald's suggested approach to newspaper antitrust enforcement policy and modify their position accordingly. Or, in a future case, a party might make the argument the Chief Judge suggests. That, however, is all the more reason to deny rehearing here. If and when we are properly faced with the contentions the Chief Judge advances, we can decide their correctness. In that event, this case might not have any enduring impact.

⁵ Perhaps appellants did not raise the predation argument here because they knew it was not raised before the Attorney General.

WALD, *Chief Judge*, with whom MIKVA and EDWARDS, *Circuit Judges*, concur, *dissenting from denial of rehearing en banc*:

The split panel's approval of the Attorney General's decision to allow the Joint Operating Agreement ("JOA") between the Detroit Free Press and the Detroit News turns on the reasonableness of a single prediction: that even in the absence of a JOA or any possibility thereof, the News will continue to price below costs, sustaining significant losses itself and driving the Free Press from Detroit. See Majority Opinion at 11, 12, 19-21. Although the Newspaper Preservation Act's definition of a "failing newspaper" is ambiguous, Congress must have meant for the term to make *economic* sense; indeed it defined a failing newspaper as one "in probable danger of *financial failure*." 15 U.S.C.A. § 1802(5) (*emphasis added*). Thus *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) requires at a minimum that the Attorney General's prediction about future newspaper prices in Detroit be economically reasonable. I believe that the economic reasonableness of the Attorney General's prediction, on which the full weight of his decision to allow the JOA rests, is sufficiently dubious to warrant *en banc* treatment.

His prediction about what would happen in the absence of a JOA makes no economic sense in light of the factual findings he himself accepted as true. Crucially, the Attorney General accepted the ALJ's basic finding that Detroit, the fifth-largest newspaper market in the country, can support *two profitable newspapers* if, in the words of Free Press management, "competitive pricing becomes rational and consistent with other markets around the country," ALJ Report at 85, *i.e.*, if these two competitors do not continue to engage in deliberately unprofitable pricing strategies with the predatory objective on the part of one paper to drive the other into

failure so as to secure a JOA.¹ The Attorney General, of course, could have substituted different factual findings about the ability of the Detroit market to support two newspapers but he did not.² Thus, his conclusion that

¹ The ALJ found that the Detroit situation was not one of a "junior" newspaper valiantly trying to retain a foothold in the market, *see* Majority Opinion at 7, and that the characteristic elements pushing one paper into a "downward spiral," *see* Majority Opinion at 13-14 and 20 n.12, did not exist in Detroit. *See* In the Matter of Detroit Free Press, Recommended Decision 95-100 (Office of the Attorney General, No. 44-03-24-8, December 29, 1987) ("ALJ Report") (discussing relationship between scale economies, downward spiral and junior paper concerns); *id.* at 112-113 (finding relationship not to exist in Detroit). Judge Silberman in his concurrence in the denial of rehearing *en banc* suggests that it is sufficient that the newspapers expressed a belief in the junior newspaper problem even if there were no facts to show this was a rational belief; the full quote from the ALJ's report is: "The strategies pursued by the Free Press and News—future domination and profitability at the cost of current profits—were perceived by management as economically rational given the history of the demise of junior papers which had entered the downward spiral. *There is no convincing proof, however, that the economic conditions underlying this history—particularly the effects of scale economies—is applicable to these two large papers.*" ALJ Report at 112-13 (emphasis added).

The ALJ explicitly found that "[t]he objective of dominance and future profitability were pursued by both papers (and their parents) in the belief that failure too had its reward in the form of JOA approval" and that dominance was sought not by exploiting cost advantages but by cutting price below costs. Consequently, "as one might expect, Detroit cannot sustain two profitable papers when both are practically being given away." ALJ Report at 115.

² Judge Silberman in his concurrence (and in the majority opinion) appears to contest this basic factual finding. But the ALJ explicitly rejected the argument that there was evidence that Detroit is a natural monopoly. And the Attorney General stated: The Free Press "plainly does not face *external* market forces—such as rising costs, competition from other media outlets and the siphoning off of readers from the metropolitan region to the suburbs—that would portend al-

only *one* newspaper has a profitable future in Detroit, depends on the assumption that below-cost pricing is *probable* for the indefinite future, *without* the prospect of a JOA. But as to this critical finding the Attorney General (*see also* Majority Opinion at 20-21) merely asserted that such pricing would not reflect "unsound business judgment" and that in response to such pricing "it would neither be counterintuitive nor contradictory" for the Free Press to shut down. Surely it cannot be enough, even under the second prong of *Chevron*, for the Attorney General just to say that, *and no more*, in view of both the ALJ's and the Antitrust Division's strong disagreement with that prediction.

Classic economic principles and basic antitrust law run counter to *any* prediction that sophisticated firms will pursue below-cost pricing strategies over the long haul. *See, e.g.,* McGee, *Predatory Pricing Revisited*, 23 J. L. & Econ. 289, 291-300 (1980); Bork, *The Antitrust Paradox*, 144-159 (1978); Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 697-704 (1975). (Newspaper giants like Knight-Ridder and Gannett certainly qualify as sophisticated). Yet this is precisely the predicate on which the Attorney General had to build his case: that the News will, *even if the JOA is denied*, price below its costs with the deliberate and unabashed goal of stran-

most certain failure. Nor . . . do there exist marketplace declines in overall advertising and newspaper circulation in Detroit of the sort that traditionally propel a junior newspaper into the proverbial "downward spiral" that is fatal to survival." Attorney General's Decision and Order, No. 44-03-24-8 (August 8, 1988) at 8 (emphasis added). Moreover, Free Press management itself stated that "one of the prerequisites to returning to profitability—for both newspapers—is restoring rational pricing in the market,"; in 1983 it "projected from an economic model that under conditions of 'normalized competition' the Free Press would earn \$1.5 million per year and the News \$5 million." ALJ Report at 85-86.

gling the Free Press; and that the News will incur heavy losses far into the future (the ALJ found that it would take at least seven to ten years to eliminate the Free Press in this fashion) on the ephemeral hope of monopoly profits at the end of the line, assuming, that is, that its monopoly status goes *unchallenged* by a new or revived rival seeking to share in the spoils.³

The Supreme Court has only recently reiterated that "predatory pricing schemes are rarely tried, and even more rarely successful," *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986) (holding summary judgment appropriate where evidence insufficient to overcome theoretical economic obstacles to predatory conspiracy), and that they are "impossible to maintain" successfully in the absence of any "reason to suppose that entry into the relevant market is especially difficult," *id.* at 591 n.15; *see also Cargill Inc. v. Monfort of Colorado Inc.*, 479 U.S. 104, 121 n. 17.⁴ In view

³ Economists agree that predatory pricing is undertaken only if the predator expects competitors to shut down and no new entry into the market to occur. *See, e.g., McGee, Bork Areeda & Turner, supra.* This analysis is of course crucially altered if a JOA is available, as the past behavior of these newspapers suggests. A JOA is precisely the type of guarantee that a potential monopolist needs to ensure that its rival will disappear for good. *See Matsushita, infra*, 475 U.S. at 591 n.15 and n.16 (barriers to entry can secure future profits needed to recoup losses sustained in driving competitor from market permanently). It is not at all "inconsistent" to argue that it is possible that unprofitable price-cutting will occur when a JOA protects a future monopoly but that such behavior is unlikely if such protection will be denied.

⁴ Indeed,, then Assistant Attorney General Douglas H. Ginsburg and Solicitor General Fried arguing for the government as *amicus curiae* urged the Court in *Cargill* to find predatory pricing schemes so inherently unlikely that a *per se* rule was justified "denying competitors standing to challenge acquisitions on the basis of predatory pricing theories." 479 U.S. at 121.

of this common wisdom, I believe the Attorney General's economic prediction about the fate of the warring newspapers deserves a second look by an *en banc* court. Neither the Attorney General nor the panel provides any reasons why standard economic principles are not relevant to this case.

Nor do I see how a court can ignore the fact that the economic behavior on which the Attorney General's grant of immunity rests comes perilously close if it does not actually constitute⁵ "a practice inimical to the purpose of the antitrust laws," *id.* at 118.⁶ The Newspaper Preservation Act authorizes the Attorney General to immunize from antitrust prosecution otherwise unlawful *mergers* between two newspapers. The Attorney General's decision here extends that immunity beyond merger to sustained below-cost pricing aimed at reducing a healthy two newspaper market to a monopoly press. In the view of the Attorney General himself the aim of at least one of the newspapers was to cut prices so as to eliminate a rival newspaper, enduring huge losses in the bargain, but thereafter attaining a monopoly. The notion that Congress intended the Newspaper Preservation Act to condone such a result is a sufficiently startling one to require perusal by an *en banc* court. Legislative history suggests that Congress wanted to preserve as many "re-

⁵ The ALJ observed that "predatory pricing" was "at least suggest[ed]" by the record. "To illustrate, it was a close question as to whether the Free Press or News would be designated the 'failing paper' for purposes of filing the JOA application. Finding 43. But the News's losses arose from such severe discounting that Gannett expressed concern over 'the potential problem of illegal advertising contracts entered into by the News and their advertisers during their war for ad volume.'" ALJ Report at 122-123 n.303.

⁶ Whether the Attorney General would seek to prosecute such behavior independently under the antitrust laws is a separate question, which need not be answered in construing the statute.

portorially independent and competitive" newspapers as possible, 15 U.S.C.A. § 1801 (congressional declaration of policy), but, recognizing that *some* markets in which two or more newspapers presently existed could support only one daily, sought to retain as much of the disappearing paper's voice as possible. Where, however, two independent papers can compete legally and stay alive, condoning resort by one to pricing which on the record is hard to distinguish from illegal predatory pricing, in order to secure a monopoly protected by a JOA, will, ironically, make it even *more* probable that newspapers will disappear than if the Act had never been passed in the first place. Whether that kind of immunity "effectuate[s] the policy and purpose" of the Act, 15 U.S.C.A. § 1803 (b), *cf.* 15 U.S.C.A. § 1803(c) (immunity not to extend to predatory acts of jointly operating newspapers), is an important enough issue to merit a full court press.⁷ For

⁷ Judge Silberman suggests that we cannot consider this consequence of the Attorney General's decision because "it was not raised by appellants." It was, however, raised by the appellants. Appellants stated in their brief that "as explained in more detail in the *amicus curiae* brief of Little Rock Newspapers, Inc., [the Attorney General's interpretation of the Act] would allow deep pocket newspaper owners to obtain a JOA almost at will . . . [A] corporation such as Gannett or Knight-Ridder that could afford short-term losses, could simply purchase a competing newspaper, and launch a price war by reducing circulation and advertising prices, which would force its competitor to do the same." Brief for Appellants at 44. As the *amicus* brief explained further in its primary argument (certainly not limited to Little Rock) that "The Newspaper Preservation Act Should Not Be Construed To Encourage Predatory Conduct:" "[t]he Attorney General's approval of the JOA . . . rewards potentially predatory conduct." "The [interpretation] convert[s] the Newspaper Preservation Act from a vehicle for preserving journalistic competition where it would otherwise not exist into a vehicle to assist in eliminating competitive newspapers even where both newspapers otherwise could survive. . . . The danger evident from the Attorney General's approval of the

these reasons, I dissent from the decision to deny rehearing *en banc*.

JOA here is that it endorses the anticompetitive tactics used." Brief for *Amicus Curiae* Little Rock Newspapers at 7; *id.* at 13. "Such a result was clearly not intended by Congress." Reply Brief of Appellants at 7 n.3. It hardly implicates case or controversy or separation of powers to point out that cutting prices to sustain current losses with the objective of eliminating a rival and securing monopoly, "predatory conduct" as it was termed by Little Rock, is presumably illegal under the antitrust laws.